

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

Case number: 6537/2021

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

DATE: 23/7/21

In the matter between:

**N[....], P on behalf of G[....] S[....] K[....]
K[....], K**

**FIRST PLAINTIFF
SECOND PLAINTIFF**

And

**W[....], N[....]
B[....], K[....]¹ P[....] M[....]**

**FIRST DEFENDANT
SECOND DEFENDANT**

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The first and second respondents (the plaintiffs) issued summons against one Dr Shaik, an obstetrician and gynecologist, under case number [....], for damages which the plaintiffs allege arose from the negligence of Dr Shaik in his treatment of Ms T[....] F[....] K[....] (the deceased). She gave birth to S[....] G[....] K[....] (G[....]) on 8 September 2015 and died a week later on 15 September 2015.

[2] Dr Shaik filed a plea on 23 March 2018, wherein he averred that he had executed his duty of care towards the deceased in conjunction with the first defendant, Dr W[....] (the excipient) and the second defendant, Dr B[....]. Dr B[....] did not file an exception. The excipient is a surgeon with a sub-specialty in critical care. Dr B[....] is a specialist anesthesiologist.

[3] Due to the fact that the hospital and clinical records did not record the excipient and Dr B[....]'s involvement, a request for further particulars was served on Dr Shaik's attorneys in order to obtain particulars with regard to their involvement. Only limited particulars were supplied and certain requests for further particulars were denied. This left the plaintiff with limited information regarding the excipient's involvement relating to the medical care of the deceased.

[4] On 9 February 2021 a summons was issued against the excipient and Dr B[....]. After entering an appearance to defend, the excipient filed a notice to remove the cause of complaint on 25 February 2021.

[5] On 15 March 2021 the plaintiff filed a notice of intention to amend. The second defendant accepted the amended pages on 7 April 2021. Despite the amendment the excipient on 23 March 2021 confirmed that the excipient wanted to pursue the exception.

[6] The issues to be determined are, whether the plaintiffs pleaded the required *facta probanda* in respect of the excipient's legal duty, whether the excipient's provision of professional services relied upon was clearly identified as a material term of the alleged doctor/patient relationship and whether the excipient's alleged legal obligations towards the deceased was expressly pleaded in the particulars of claim as amended, in order to establish whether there was a breach thereof.

THE PLEADINGS

[7] The exception is based on the allegation that the particulars of claim is vague and embarrassing, alternatively lacks the necessary averments to sustain a cause of action further alternatively fails to disclose a cause of action.

[8] The amended particulars of claim par 4 in relevant part reads as follows:

“4.1 A summons with particulars of claim (hereinafter “the Shaik action”) was issued on 17 November 2017, and served on 5 December 2017, by the plaintiffs herein, against Dr Mohamed Zaheer Shaik (hereinafter “Dr Shaik”), a specialist obstetrician and gynecologist, who had attended to the deceased’s pregnancy and labour during 2015.

4.2 In the Shaik action, the plaintiff pleaded, in respect of Shaik’s legal duty of care that

4.2.1 During 2015 and at the consultation rooms of Dr Shaik, the deceased, acting personally, and Dr Shaik, also represented personally, concluded a verbal agreement in terms whereof Dr Shaik would examine, assess, advise and manage the deceased’s pregnancy, labour and parturition, and would provide medical and surgical services to her in respect whereof, with such skill, care and diligence as could reasonably be expected of a specialist obstetrician and gynecologist rendering such agreed services.

4.2.2 As a consequence of the aforesaid agreement a doctor/patient relationship arose and continued to exist between the deceased and Dr Shaik until the deceased’s transfer from Dr Shaik’s care on 10 September 2015.

4.2.3 By reason of the existence of the aforesaid doctor/patient relationship, a legal duty of care arose and rested on Dr Shaik in respect of the treatment and care of the deceased and the rendering and provision of advice, and medical and surgical services with such skill, care and diligence as could reasonably be expected of a specialist obstetrician and gynecologist in similar circumstances.

4.3 In a plea dated 20 February 2018, served on the plaintiffs on 23 March 2018, Dr Shaik admitted his legal duty of care toward the deceased and averred that this legal duty was executed in conjunction with the first and second defendants herein.

4.4 During September 2015 and at the Netcare Femina Hospital, Dr Shaik, who was treating the deceased, and acting on behalf of the deceased,

involved the first and second defendants herein in the treatment of the deceased.

4.5 In a request for further particulars to Dr Shaik, served on Dr Shaik's attorneys of record on or about 16 April 2018, Dr Shaik was requested to provide the following particulars in relation to the first defendant herein including

- 4.5.1 the full names of the first defendant;
- 4.5.2 the address from whence the first defendant practices;
- 4.5.3 qualification or specialty in medicine, of the first defendant, as applicable on 10 September 2015.

4.6 In so far as Dr Shaik avers that he executed his legal duty in conjunction with the first defendant herein, Dr Shaik was requested

- 4.6.1 to state at whose request the first defendant became involved in the execution of the duty of care of the deceased;
- 4.6.2 to provide the reason for the involvement of the first defendant in the care and/or treatment of the deceased;
- 4.6.3 to state the time on 10 September 2015 when the first defendant become involved in the execution of the duty of care toward the deceased;
- 4.6.4 to inform the plaintiffs what treatment and/or investigation and/or advice was rendered by the first defendant herein in relation to the deceased;
- 4.6.5 to advise on what basis Dr Shaik avers that the first defendant also owed the deceased a duty of care.

4.7

4.8

4.9 In a reply to the aforesaid request for further particulars, Dr Shaik responded on 26 July 2018, as follows:

4.9.1 The first defendant herein

4.9.1.1 is a specialist surgeon with a registered sub-specialty in critical care;

4.9.1.2 practices at suite 30, 3rd Floor, L[....] M[....]2 Park, 2[....] C[....] Lane, L[....]2 Manor, C[....]2;

4.9.1.3 rendered professional services to the deceased pursuant to the deceased's referral to the first defendant

(a) by Dr Shaik;

(b) on 9 September 2015.

4.9.1.4 Dr Shaik further responded that the remaining particularity sought in relation to the first defendant "constitutes matters for evidence to which the plaintiffs are not currently entitled alternatively constitute interrogatories to which the defendant is not obliged to, and does not, submit."

[9] The plaintiffs continued to plead, in relevant part, as follows:

"4.10 As a consequence of the aforementioned involvement in the treatment of the deceased, and the first and second defendant's acceptance of the deceased as a patient, a doctor/patient relationship arose and continued to exist between the deceased, on the one hand, and the first and second defendants, on the other, until the deceased's transfer on 10 September 2015.

4.11 By reason of the existence of the aforesaid doctor/patient relationship, a legal duty of care arose and rested on the first and second defendants in respect of the treatment and care of the deceased and the rendering and provision of advice, and medical and surgical services which were reasonably required by the deceased with such skill, care and diligence as could reasonably be expected of a specialist surgeon in critical care and anesthesiologist, respectively, in similar circumstances."

[10] In par 5.1 to 5.19 of the particulars of claim the facts pertaining to Dr Shaik's treatment of the deceased is set out in great detail. Then in par 5.20 the involvement of the excipient and the second defendant is set out as follows:

"5.20 On or about 9 and/or 10 September 2015, at an unknown time, the first and second defendants became involved in the care of the deceased.

5.20.1 The first defendant herein rendered critical care treatment to the deceased as averred by Dr Shaik and as set out in paragraph 4.9.1 above;

5.20.2 The second defendant herein performed an anesthetic on the deceased and provided further critical care to the deceased, as set out in paragraph 4.9.2 above.

5.21 On 10 September 2015 the deceased was transferred to the S[....] B[....] A[....] Hospital (hereinafter the "SBAH"). The reason for the transfer was recorded on transfer documents as being for "financial reasons".

[11] Regarding the breach of the alleged legal duty owed by the excipient the pleading reads as follows:

"6. In wrongful breach of the legal duty owed by the defendant to the deceased, the first and/or second defendants, was/were negligent in one or more of the following ways in that: he/they

6.1 failed to note that the deceased was probably suffering an internal bleed, alternatively failed to act, timeously or at all, in appreciation of an awareness of an internal bleed on 8 September 2015 to 05h00 on 9 September 2015; and/or

6.2 failed to note, alternatively to act in appreciation of the fact that the deceased's hemoglobin was critically low and on 9 and 10 September 2015 despite the blood transfusion and to arrange to re-admit the deceased to theatre for a second re-look laparotomy and/or sub-total hysterectomy; and, or

6.3 failed to arrange a computerized tomography scan (“CT scan”) of the deceased’s abdomen to assess whether there was evidence of a continued internal bleed on either 9 or 10 September 2015.

6.4 allowed the deceased’s condition to deteriorate for unduly long periods with the result that she developed a disseminated intravascular coagulopathy and severe liver damage, when such damage could and should have been avoided by the timeous re-admission to theatre to control the abdominal bleeding; and/or

6.5 failed to intervene surgically, or to procure the assistance of a general or vascular surgeon timeously or at all; and/or

6.6 arranged and/or allowed the transfer of the deceased to another hospital in circumstances where the deceased’s condition was unstable and require further surgery, when he/they ought to have first performed, or arranged for a second re-look laparotomy and sub-total hysterectomy, and stabilization of the deceased, prior to transfer to another facility; and/or

6.7 failed to prevent the deceased from developing complications as a consequence of the abdominal bleeding in circumstances where he/they could and should have done so by timeous re-admission to theatre and/or referral to a general vascular surgeon for assistance and/or failed to treat the deceased with due professional skill, diligence and care as can reasonably be expected of a specialist surgeon in critical care and anesthesiologist, respectively, resulting in the death of the deceased.

[12] The first complaint was that the plaintiff placed reliance on the claim against the excipients on the admission of a legal duty of care by Dr Shaik, which legal duty of care Dr Shaik claims to have executed in conjunction with the excipient. The excipient alleged that the plaintiffs failed to specify the basis upon which Dr Shaik’s

legal duty of care arose, what legal duty of care was admitted by Dr Shaik which he avers to have executed in conjunction with the excipient, alternatively the plaintiffs failed to attach the summons against Dr Shaik and his plea thereto.

[13] The second complaint was that in par 4.3 of the particulars of claim, it was pleaded that during September 2015 and at the Netcare Femina Hospital, Dr Shaik who was treating the deceased involved the excipient and second defendant in the treatment. In par 4.4 the plaintiffs plead that as a consequence of the involvement in the treatment of the deceased a doctor/patient relationship arose between the excipient and the deceased until the deceased's transfer to another hospital on 10 September 2015. However, it is alleged that the plaintiffs failed to set out the facts, or sufficient facts on which they rely for the existence of the legal duty. It is alleged that it is not clear from the particulars of claim how Dr Shaik involved the excipient and what precisely the excipient's involvement entailed, to give rise to the doctor/patient relationship.

[14] The third complaint was that in par 4.5 of particulars of claim it was alleged that by reason of the existence of the doctor/patient relationship, a legal duty of care arose and rested on the excipient in respect of the treatment of the deceased and the rendering and provision of advice and medical and surgical care and diligence, as could reasonably be expected of a specialist surgeon in critical care. However, it was alleged that the plaintiffs failed to set out the facts on which they rely for the existence of a doctor/patient relationship.

[15] The fourth complaint was that in par 5.20 the plaintiffs plead that at an unknown time and date the excipient became involved in the care of the deceased. In par 6 the plaintiffs set out what they allege the content of the legal duty of care is which they allege the excipient is alleged to have breached. However, it is alleged that the plaintiffs have failed to set out the facts on which the allegations of the excipient's breach of a legal duty of care are based. It is alleged that it is not sufficient to make the mere allegation without pleading the relevant facts on which the excipient's involvement is based.

THE APPLICABLE LEGAL PRINCIPLES APPLIED TO THE COMPLAINTS

[16] It is trite that the excipient has the duty to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it.¹ It follows that the pleadings must be looked at as a whole, if uncertainty arises regarding a pleader's intention the excipient must show that upon any construction of the pleadings, the claim is expiable, a "charitable test" is used and the pleader is entitled to a benevolent interpretation.²

[17] An exception that a pleading is vague and embarrassing will only be allowed if the excipient would be seriously prejudiced if the offending allegations are not expunged.³ The correct test to apply, when considering an exception is to accept, at this stage, that the allegations contained in the particulars of claim are true and then determine whether it discloses a cause of action.⁴ It is also trite that the defect must appear *ex facie* the pleadings and no extraneous facts may be used to show that the pleading is excipiable, apart from instances where an inconsistency exist⁵

[18] The provisions of Rule 18(4) states that "*every 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*". Uniform Rule 22(2) states that the defendant shall in his plea either admit or deny, or confess and avoid all the material facts alleged in the combined summons or declaration, or state which of the facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he/she relies. Uniform Rule 18(4) read with 22(2) requires of a pleading to state the concise material facts, plead the legal conclusion flowing forth from the material facts, and that the material facts and legal conclusion drawn there from must substantiate the relief sought by the plaintiff in its prayers.

¹ It v Fetal Assessment Centre 2015(2) SA 193 CC at para 10; Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006(1) SA 461 (SCA) para 3; Children's Resources Centre Trust & others v Pioneer Food (Pty) Ltd & Others 2013(2) SA 213 (SCA) at para 36

² Nel & others NNO v McArthur 2003(4) SA 142 (T) at 149E-G

³ *Ibid*

⁴ Stewart v Botha 2008(6) SA 310 (SCA) at para 4

⁵ Barnard v Barnard 2000(3) SA 74 (C) at para 10; YB v SB supra at para 12

[19] The excipient contended that the plaintiffs claim should be founded in contract and relied on *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd*,⁶ for this proposition, the reliance on the aforesaid authority was misplaced. In medical negligence cases the duty of care owed to the patients can be either contractual or delictual.⁷ Whether the claim is contractual or delictual will depend on the facts. A duty of care arises from the agreement between the parties and physician which involves the physician who undertakes to execute the patient's instruction with reasonable care and skill.⁸ Whether it did indeed arise in this instance is not for this court to decide, nor whether in this situation a duty of care was imposed on the medical practitioner. The question at this stage is merely whether a proper case is made out on the pleadings.

[20] A formal doctor/patient relationship (based on the agreement) is not a necessity. The mere fact that a medical practitioner becomes involved in the treatment of a patient places him in a position of being responsible for the patient. The law regards this as sufficient to give rise to a legal duty to avoid negligently causing harm.⁹

[21] It is clear that the underlying doctor/patient relationship between the deceased, Dr Shaik and the excipient has been pleaded with sufficient particularity, to establish the basis on which the plaintiffs' allege that a legal duty was established between the excipient and the deceased, as well as the nature and scope of the alleged duty.

⁶ 1985(1) SA 475

⁷ *Correira v Berwind* 1986(4) SA 60 (ZH) at 64E-66H; *TS & Another v Life Healthcare Group (Pty) Ltd & another* 2017(4) SA 580 (KZN); See also *Life Health Care Group (Pty) Ltd v Sulliman* 2019(2) SA 185 (SCA) although the appeal was upheld the SCA did not question the fact that a medical practitioner's duty could be both contractual and delictual

⁸ *Strauss & Strydom* 1967, p266; *McQuoid-Mason & Strauss* 1883 LAWSA Vol. 17, par. 151; *Van Oosten* 1996, p57; *Strauss*, 1991, par. 36 – 37; *Strauss "Duty of Care of Doctor Towards Patient May Arise Independent of Contract"* SA Practice Manual, Vol. p155, par. 2, 1988; *Correira v Berwind* 1986(4) SA 60 at 66 F; *Van Wyk v Lewis* 1924 AD p443 444; 455 – 456; *Collins v Administrator Cape* 1995(4) SA 73 at 81; *Buis v Tsatsarolakis* 1976(2) SA 891 T.

¹⁰ See also *Neethling Potgieter & Visser*, 1989 Sect. 4 – 5 where the authors state: "*There is no fundamental difference between a delict and a breach of contract, the injured party can choose to act on the one or the other.*"

⁹ *Minister of Safety & Security v Van Duiven Boden* 2002(6) SA 431 SCA at par. 25; *Life Healthcare Group (Pty) Ltd v Suliman* 2019(2) SA 185 SCA at par. 10.

[22] The plaintiffs set out in exact terms that the duty of care of Dr Shaik arose from a doctor/patient relationship which is based on a prior verbal agreement. The terms of the verbal agreement are set out and as a result of the agreement concluded, a doctor/patient relationship arose as a result of which Dr Shaik incurred a legal duty towards the deceased. The plaintiffs continued to set out the scope and ambit of Dr Shaik's legal duty in para 4.2.3 of the particulars of claim.

[23] The plaintiffs in par 4.3 of the particulars of claim allege that Dr Shaik admitted his duty of care, but stated that he exercised it in conjunction with the excipient and the second defendant. This constitutes an admission and avoidance as provided for in rule 22(2),¹⁰ Which in turns lays the basis for joint liability as envisaged in Rule 10(3) which reads as follows:

“Several defendants may be sued in one action jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately would arise in each separate action.”

[24] The excipient furthermore complains that the particulars of claim were not annexed to the particulars of claim. This complaint is also without merit as Rule 18(6) only applies to claims which are based on a written agreement. What is required in terms of Rule 18 is a concise statement of material facts, which the plaintiffs did provide. The excipient has an additional remedy if he feels aggrieved and that is to serve notices on terms of Rules 35(12) and (14)¹¹ on the plaintiffs.

¹⁰ (2) The defendant shall in his plea either admit or deny or confess and avoid all material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.

¹¹ (12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording or his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.

(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof

[25] The excipient furthermore alleges that the plaintiffs did not state when the summons against Dr Shaik was issued. This allegation is wrong as in par 4.1 of the particulars of claim the plaintiffs allege that the summons was issued on 17 November 2017 and served on 5 December 2017. The first complaint should therefore be dismissed.

[26] The excipient continues to allege that the plaintiffs fail to set out the facts on which they base their claim, alternatively did not set out sufficient facts to support their claim of the legal duty of care allegedly owed by the excipient. It is alleged that it is unclear how Dr Shaik involved the excipient and what his involvement entailed. A perusal of par 4 read with par 5 and 6 clearly illustrates that there is no merit in this complaint.

[27] It needs to be borne in mind that the plaintiffs' claim is not based on a positive act committed by the excipient, but rather on a failure to act. The plaintiffs do therefore not allege that there were certain positive actions taken by the excipient, which were negligently carried out by the excipient.

[28] The duty of care is a recognised duty of care in law and the basis for the existence of the duty of care is identifiable (a doctor/patient relationship), accordingly the pleading is not rendered excipiable. In this instance the excipient will be called upon to file a plea in the form of a confession and avoidance or a denial. In addition thereto, any prejudice can be cured by means of a request in terms of Rule 21. In the light from the aforesaid, the second complaint has no merit.

[29] In this instance, in any event the precise involvement of the excipient and his undertakings can only be clarified during evidence. None of the plaintiffs are in a position to plead any further allegations to those that they already have. The information falls exclusively within the knowledge of Dr. Shaik and the excipient. It was submitted that it would also in this regard not be competent for a Court, at this point, to find that the particulars of claim are excipiable. The excipient's precise involvement can only be clarified during evidence. The information falls exclusively

within the knowledge of the excipient and therefore it is not competent for this court to find that the particulars of claim are excipiable.

[30] The excipient's heads of argument dealt with the third and fourth complaints as a single issue. The excipient advanced the argument that the particulars of claim does not differentiate between a claim formulated in contract and that in delict. However, the grounds were not advanced in the notice of exception, as a result the excipient is not allowed to raise this ground for the first time in the heads of argument. In any event the plaintiffs pleaded the legal duty attributable to the excipient, namely a negligent and wrongful breach thereof and damages as a result of such breach. The aforesaid identified the plaintiffs claim against the excipient to be founded in delict.

[31] The grounds of exception advanced in par 3.2 as part of the notice of exception is a repetition of the grounds of complaint as set out in par 2.3 and have already been dealt with. Regarding the fourth complaint the excipient alleges that the plaintiff without having pleaded the "positive involvement" of the excipient, is not entitled to plead facts relating to wrongful and negligent breach of duty of care. This argument has no merit, it is both untenable in law and disregards the nature of a claim founded on a negligent breach of duty of care or omission.

[32] One should take into consideration, as already stated, that the plaintiffs' claim is a claim based on a failure to act, which should be distinguished from a positive negligent claim. Our courts demand that a legal duty of care be established before a failure to act can be pleaded. It is not required that the plaintiffs are obliged to plead that certain positive duties exist before, an entitlement to allege a failure to act arises.

[33] In the light of the aforesaid the complaints raised by the excipient do not have any merit and should be dismissed.

COSTS

[34] The costs should follow the outcome, the only issue is whether costs of senior counsel should be allowed. Mr Boot (SC), quite correctly, conceded that the case does not justify the employment of senior counsel, but that it was prudent to do so in this instance. He also quite correctly conceded that the question of costs is in the final analysis in the discretion of the court. As helpful as Mr Boos (SC's) contribution was I am not convinced that costs of senior counsel should be awarded in this case.

[41] I make the following order:

1. The exception is dismissed;
2. The excipient is ordered to pay the costs of this application.

R G TOLMAY
JUDGE OF THE HIGH COURT OF PRETORIA