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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA (LIMPOPO DIVISION, POLOKWANE)

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| (1) | <u>REPORTABLE: YES/NO</u> |
| (2) | <u>OF INTEREST TO THE JUDGES: YES/NO</u> |
| (3) | <u>REVISED.</u> |

CASE NO: 1659/2017

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DATE.....

SIGNATURE:.....

In the matter between:

N M

PLAINTIFF

AND

MEC FOR HEALTH LIMPOPO

DEFENDANT

JUDGMENT

KGANYAGO J

- [1] The plaintiff has issued combine summons against the defendant claiming R1 100 000-00 for alleged professional negligence by the hospitals' doctors and nursing staff at the various hospitals that treated the plaintiff.
- [2] The defendant has entered notice of intention to defend the plaintiff's action. The defendant raised the first exception against the plaintiff's particulars of claim. The plaintiff amended her particulars of claim. After effecting the amendment, the defendant raised the second exception on the plaintiff's amended particulars of claim.
- [3] According to the defendant, the plaintiff's amended particulars of claim still failed to rectify the complaint that the plaintiff's particulars of claim are vague and embarrassing, and further that they did not disclose a cause of action.
- [4] The defendant contends that the plaintiff's particulars of claim lacks the averments that are necessary to sustain a cause of action, and also that they are vague and embarrassing to an extent that the defendant is unable to plead. The defendant further submit that it is unable to ascertain the case it has to meet. The plaintiff on the other hand

contends that it has cured the complaints that the defendant has raised in its first exception. The plaintiff submits that what the defendant is now raising are technical issues which can be cured by evidence.

- [5] An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity. (See **Trope and Others v South African Reserve Bank 1993 (3) SA 264 (A) at 269 I**). A court will not uphold an exception on the ground that it is vague and embarrassing and set aside the summons unless the exception goes to the root of the action. (See **SA Motor Industry Employers' Association v SA Bank of Athens 1980 (3) SA 91 (A)**).

- [6] Rule 18 (4) of the Uniform Rules of Courts ("the Rules") reads as follows:

" Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto"

- [7] In order to succeed an excipient has a duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed; failing which the exception ought not to be upheld.
- [8] The defendant submit that it is confusing and embarrassing for the plaintiff to state in her particulars of claim that she was admitted for a tibia-fibula fracture on her right leg and ankle and that X-rays were taken, and was placed in a cast, whilst on the other hand she alleges that she was left wondering of her progress as the diagnoses and the treatment were not discussed with her. The defendant further state that failure by the plaintiff to allege how she learned about the nature of her injury renders her particulars of claim to be vague and embarrassing, and also lack averments that are necessary to sustain a cause of action. The defendant further state that the plaintiff's failure to state the dates on which she was discharged from various hospitals renders her particulars of claim to be vague and embarrassing. The defendant further state that it is confusing to them as to which hospital had allegedly put the cast on the plaintiff. The defendant further state that the plaintiff has failed to state the treatment she had received which according to them is material in a medical negligence claim. The defendant further states that the

plaintiff had made contradictory allegations in her particulars of claim. The defendant further state that the plaintiff has failed to state the alleged damage caused by the doctors and nursing staff at various hospitals, and therefore, that renders the plaintiff's particulars of claim not to disclose a cause of action.

- [9] Plaintiff state in her particulars of claim that on the 18th November 2014, the doctor at Musina Hospital had informed her that her leg had healed properly and thereafter removed the cast on her leg. The plaintiff further state in her particulars of claim that on the 10th February 2015 she went to Musina Hospital with severe pains and swelling on the leg. She was referred to Tshilidzini hospital where she was told that her leg had not healed properly and that the bone growth of the fracture had not re-attached straight as it should have. On the 07th May 2015 a physiotherapist told him the same thing that she was told at Tshilidzini hospital. She was thereafter admitted at Tshilidzini hospital for four days. She further state that after she was discharged from Tshilidzini hospital she went for several follow up treatment until she was told that it was no longer necessary to attend the hospital anymore. However, she states that to date she has not fully healed. In her particulars of claim she also state what the doctors should have done, but failed to do.

[10] In **Living Hands v Ditz 2013 (2) SA 368 (GSJ)** at para 15 Makgoka J said:

[15] Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

(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 even of an exception.

(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. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(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 merits.

(f) Pleading 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.”

[11] In the present case, the plaintiff has stated which hospital was the last to admit her, which hospitals she was transferred from, and ultimately which hospital has told her that she had fully recovered. Thereafter she stated when she became aware that she had not fully recovered and what happened thereafter. That in my view is sufficient to disclose a cause of action. The mere fact that the plaintiff has failed to state the dates on which she was discharged from hospital, the number of days spent in hospital, and the treatment received can be cured by requesting further particulars for the purposes of trial.

[12] The complaint that the plaintiff have used words or sentences in her particulars of claim such as ‘aforementioned hospital’, ‘such as surgery’; ‘conservative treatment’ and ‘instead’ are all technical complains that does not strike at the formulation of the cause of action. The defendant seems to complain about specific parts of the paragraphs without reading the pleadings as a whole. In my view, the defendant has failed to establish that upon any construction of the plaintiff’s particulars of claim, no cause of action has been disclosed. The plaintiff has averred sufficient averments that are necessary to sustain her cause of action. Therefore, the defendant’s exception has to fail.

[13] In the result I make the following order:

13.1 The defendant’s exception is dismissed with costs.

KGANYAGO J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA,

**LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES

For Plaintiff	: Adv S Schnehage
Instructed by	: Erwee Attorneys
For Defendant	: Adv FPW Modjadji
Instructed by	: State Attorney Polokwane
Date of Hearing	: 8th August 2018
Date of Judgment	: 12th September 2018