


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE NO. 2015/19909

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
<u>19 8 2021</u>	
DATE	SIGNATURE

In the matter between:

MATSHIDISO GODFREY MELAMU

Respondent/Plaintiff

and

**LEGAL EXPENSES INSURANCE SOUTHERN
AFRICA LIMITED t/a LEGALWISE**

Applicant/First Defendant

MAKHAFOLA & VERSTER INC ATTORNEYS

Second Defendant

JUDGMENT

NOCHUMSOHN (AJ)

1. This is an Application for an Exception under Rules 23(1) and 30(1) and (2).
2. The Applicant is the First Defendant in the main action, and the Respondent is the Plaintiff in the main action. For convenience purposes, I will refer to the Applicant as the First Defendant and the Respondent as the Plaintiff, in this judgement.
3. The First Defendant delivered a Notice in terms of Rule 23(1), taking issue with the Plaintiff's Particulars of Claim upon the grounds that same are vague and embarrassing and do not disclose causes of action against both the First and Second Defendants.
4. The Plaintiff did not take steps to move for an amendment to the Particulars of Claim in order to address the subject matter complained of in the Rule 23(1) notice.
5. In the result, the First Defendant launched the present Application, seeking to have the Plaintiff's Particulars of Claim struck for want of non-compliance with Rule 18.
6. In terms of Rule 30(1) and (2), the First Defendant emboldened the application by objecting to the Particulars of Claim upon the basis that they constitute an irregular step, and, as such the First Defendant seeks that the Particulars of Claim be set aside.



7. By way of illumination of background:
 - 7.1. The First Defendant is a legal insurance company;
 - 7.2. The Plaintiff was a policyholder with the First Defendant company;
 - 7.3. The Second Defendant in the main action, who is not a party to this application, is a firm of attorneys;
 - 7.4. The Plaintiff lodged a claim with the First Defendant, who referred the Plaintiff to the Second Defendant to act on the Plaintiff's behalf in relation to such claim.
8. The Plaintiff alleges in the Particulars of Claim that the Second Defendant was dilatory in pursuing his claim, resulting in such claim being dismissed by the Labour Court. Consequently, the Plaintiff sued the Second Defendant based upon professional negligence.
9. The Plaintiff's claim against the First Defendant hinges upon allegations in the Particulars of Claim to the effect that the Second Defendant was the agent or independent contractor of the First Defendant. Accordingly, the Plaintiff seeks to hold the First Defendant vicariously liable for the alleged professional negligence of the Second Defendant, alleging that the Second Defendant acted within the scope of a mandate granted by the First Defendant.
10. In its first ground of exception, the First Defendant avers that the Plaintiff seeks to hold the First Defendant liable for the alleged professional negligence of the Second Defendant on the grounds that the Second Defendant was its agent or the Second Defendant was the independent contractor of the First Defendant.



11. I am in agreement with the First Defendant's submission to the effect that from the manner in which the Plaintiff sets out his claim, he presupposes that a principal/agent relationship existed between the First Defendant and the Second Defendant. The Particulars of Claim lack essential averments and must of necessity have alleged:

11.1. The existence of a contractual relationship between the First Defendant and the Second Defendant so as to import vicarious liability upon the First Defendant for the misdeeds of the Second Defendant, acting *qua* agent; and

11.2. Having alleged a contractual relationship between the First Defendant and Second Defendant, the terms of such relationship must be set out in concise terms so as to meet the requirements of Rule 18(6).

12. In ***Charter Hi (Pty) Ltd & another v Minister of Transport***¹, the SCA said:

"Where there was no contractual relationship between a person accused of negligence and the defendant (whether in the nature of an employment contract or one of principal and agent), even if the plaintiff had proved that a negligent act or omission on the part of the relevant person had caused the destruction of its property there was no merit in the argument that the defendant was vicariously liable for the judgment."

13. Thus the existence of a contract between the First Defendant and Second Defendant is fundamental to sustaining a cause of action for vicarious liability against the First Defendant. By his failure to have pleaded the existence of a

¹ [2011] JOL 27296 (SCA)



contract between the First Defendant and the Second Defendant, the Particulars of Claim are excipiable, for want of disclosure of a cause of action.

14. Whilst the Plaintiff, at paragraph 12 of the Particulars of Claim does allege that a mandate existed between the First Defendant and the Second Defendant, the terms of such mandate are not pleaded, bringing about a failure of compliance to the provisions of Rule 18(6). There is nothing pleaded in relation to such mandate, as to whether same is written, or oral, when and by whom same was concluded and neither is a copy thereof annexed. Such failure is certainly excipiable, leaving the First Defendant embarrassed in pleading thereto.
15. In ***Stein v Rising Tide Productions CC***² the general rule that an employer is not liable for the wrongdoing of an independent contractor unless the employer was personally at fault, was clearly enunciated.
16. Further, a principal is only liable for the negligence of his independent contractor, where there is a legal duty alleged on the part of the employer to take steps to prevent harm to members of the public.³
17. Thus, it was necessary for the Plaintiff, in alleging the First Defendant's vicarious liability for the acts of the Second Defendant, to plead and establish the existence of a legal duty upon the shoulders of the First Defendant, *qua* principal of the Second Defendant. No such allegations are set out in the Particulars of Claim, leaving same excipiable.

² 2002 (5) SA 199 (C)

³ *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 at pages 11 and 14



18. In the First Defendant's second ground of complaint, it avers that the holding of the Second Defendant liable for professional negligence is based upon a delictual cause of action, as the Particulars of Claim read.
19. The First Defendant correctly submits that the relationship between an attorney and client is contractual, and imposes a duty to exercise due skill and care in the conduct of a client's affairs⁴. Such contractual relationship is subject to an implied term that the attorney will use the normal care expected from a plain professional person and the failure to exercise this standard constitutes breach of an implied term i.e. a breach of contract.⁵
20. I agree with the First Defendant's submission that the Plaintiff's action against the Second Defendant for professional negligence should have been pleaded in breach of a contract, setting out its terms, whether it was written, oral or tacit, and if in writing, a copy thereof ought to have been annexed, failing which the allegations, as they read, are excipiable and to which the First Defendant is embarrassed in pleading thereto.
21. I share the First Defendant's view that the Plaintiff has failed to plead a case for vicarious liability against the First Defendant inasmuch as he has failed to allege that the Second Defendant was acting upon the instructions, or was under the control of the First Defendant, whilst pursuing the Plaintiff's claim. On the Plaintiff's own version, the Second Defendant was acting in accordance with the Plaintiff's instructions. This allegation contradicts the allegation that the

⁴ *Bruce NO v Berman 1963 (3) SA 21 (T); Mouton v Die Mynwerkersunie 1977 (1) SA 119 (A) at pages 119 and 122*

⁵ *Groom v Crocker 1938 2 ALL ER 394 (CA) 401 to 402*



First Defendant is vicariously liable for the actions of the Second Defendant, if the Second Defendant was acting upon instructions of the Plaintiff himself.

22. In *Levitan v Newhaven Holiday Enterprises CC*⁶, it was held that an exception that a pleading is vague and embarrassing would not be upheld, unless the excipient would be seriously prejudiced if the offending allegations were not expunged. The effect of this is that the exception can be taken only if the vagueness relates to the cause of action.⁷
23. In paragraph 8.5 of the Particulars of Claim, the Plaintiff avers that the dismissal of his claim was occasioned by the First Defendant's delay in pursuing such claim. Such allegation is repeated at paragraph 10 of the Particulars of Claim. In making such allegations, the Plaintiff does not provide the facts to support the alleged negligence on the part of the First Defendant.
24. The further ambiguity lies in the Plaintiff having alleged, on the one hand, that the First Defendant is liable only vicariously for the Second Defendant's negligence, whereas on the other hand, there are allegations against the First Defendant for its own negligence, without the grounds of negligence having been expounded upon and without the said allegations having been pleaded in the alternative.
25. I accept the First Defendant's submissions that the aforesaid state of affairs gives rise to contradictory, inconsistent and mutually destructive pleadings, to

⁶ 1991 (2) SA 297 (C) 298 A

⁷ *Carelsen v Fairbridge, Ardene and Lawton 1918 TPD 306 at 309*, approved, inter alia, in *Lockhat v Minister of the Interior 1960 (3) SA 765 (D) at 777 E* and *Brits v Coetzee 1967 (3) SA 570 (T) at 572 A*



which the First Defendant is embarrassed in having to plead as it is left guessing as to the true nature of the Plaintiff's cause of action.

26. As a further ground of complaint, the First Defendant relies on the Plaintiff having pleaded in the Particulars of Claim that the Second Defendant is solely negligent for the failure to have timeously pursued his claim against ABSA. Notwithstanding attributing such negligence solely to the Second Defendant, the Plaintiff, in a contradictory manner, alleged that the First Defendant was also negligent for the delay.
27. I must agree with the submission of the First Defendant that if the Second Defendant is solely negligent for the said failure, then it stands to reason that the First Defendant cannot also be negligent for the same conduct. It is not clear, on a reading of the Particulars of Claim, which of the two defendants was negligent, or whether both of them were so negligent. These inconsistencies do render the Particulars of Claim ambiguous, and accordingly leaves the First Defendant embarrassed in pleading thereto.
28. Turning to the Rule 30 portion of the Application, based upon irregular steps, in paragraph 5 of the Particulars of Claim, the Plaintiff alleges that he and the First Defendant entered into an insurance cover policy agreement. In so pleading, the Plaintiff fails to attach to the Particulars of Claim a copy of the policy document, does not make any allegations as to whether same is written or oral, or when, where and by whom same was concluded. Thus the Particulars of Claim do constitute an irregular step, for want of compliance with Rule 18(6).
29. In addition, Rule 18(4) requires every pleading to embody a clear and concise statement of the material facts upon which the pleader relies, with sufficient



particularity, to enable the opposing party to respond. The Plaintiff has failed to set out material allegations necessary to establish a case that the Second Defendant was either the agent or independent contractor of the First Defendant, and has failed to concisely plead the material facts necessary to sustain his claim for vicarious liability. In this regard, the Particulars of Claim fall short of compliance with Rule 18(4). Such failure indeed gives credence to the status of the Particulars of Claim, as written, as being an irregular step. Moreover, the Particulars of Claim are contradictory, inconsistent and mutually destructive, as more fully set out in the above respects, and as such do not comply with Rule 18(4), leaving the First Defendant guessing as to the exact nature of the Plaintiff's cause of action, for which reason, in addition, the Particulars of Claim do constitute an irregular step.

30. It is of moment to note that in response to the First Defendant's Notices under Rule 23(1) and 30(2)(b), the Plaintiff delivered replies.
31. The Plaintiff was not called upon to deliver replies and such step in and of itself is irregular. The only way for a Plaintiff to deal with a Notice in terms of Rule 23(1) is by way of delivery of a Notice of Intention to Amend, in order to address the complaint raised. If a recipient of such a notice elects not to address the complaint, it is not necessary to deliver a reply to the notice. The recipient should simply oppose any forthcoming application for the striking of the pleading.
32. I must agree with the First Defendant's averment that the Plaintiff's responses, refuting the grounds of complaint, have the effect of leaving the Particulars of Claim, as they stand in their original state. As such, the defects complained of



have not been cured, notwithstanding the delivery of the Plaintiff's notices in reply.


33. In the circumstances, I make the following order:

33.1. The Plaintiff's Particulars of Claim are set aside as an irregular step;

33.2. The Plaintiff is afforded a period of ten days from date of service of this Order to deliver amended Particulars of Claim;

33.3. Failing the delivery of amended Particulars of Claim within the aforesaid time period, the Plaintiff will be *ipso facto* barred from so amending and the First Defendant may, in those circumstances, upon the same papers duly supplemented, if necessary, apply for the action to be dismissed;

33.4. The Plaintiff is to bear the costs of this Application.



NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

On behalf of the Respondent/Plaintiff:	Attorney Mr T Mkhwanazi
Instructed by:	TJM Inc Attorneys
On behalf of Applicant/First Defendant:	Advocate Ms Mpakanyane
Instructed by:	Norton Rose Fullbright South Africa
Date of Hearing:	17 August 2021
Date of Judgment:	19 August 2021
Delivered via email:	19 August 2021