

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 9395/2022

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

In the matter between:

THOMAS DANIEL ZELOLO

PLAINTIFF

And

ANGLO AMERICAN PLATINUM MOGALAKWENA MINE

DEFENDANT

JUDGEMENT

KGANYAGO J

- [1] The plaintiff has instituted an action against the defendant. According to the plaintiff's particulars of claim, he was employed as a heavy load truck

operator. The plaintiff's job description was to transport big stones. This truck caused the plaintiff to suffer pain and injuries in the back of his body, neck and shoulders. The medical doctors recommended that the plaintiff was suitable for light duties, and to work only during day shift. The defendant disregarded the plaintiff's medical condition and doctors' recommendations and subjected the plaintiff to operate the heavy load truck during night shift. The plaintiff sustained serious pains and suffering which resulted in him been declared medically unfit to work and/or incapacitated by the defendant on 8th March 2022.

- [2] The plaintiff alleges that the defendant was negligent in that it failed to ensure that the heavy load truck complies with safety standards conducive and safe to use. The plaintiff alleges that he is entitled to compensation and/or damages against the defendant for damages arising out of the injuries suffered by him during the course or scope of his employment at the business premises of the defendant on 8th July 2019.
- [3] The plaintiff further alleges that the defendant had contravened the provisions of the Occupational Health and Safety Act 85 of 1993 ("OHSA") by failing to ensure that the working environment and the heavy load truck was safe to use and to maintain or put precautionary measures to ameliorate any potential pain and suffering or ill-health which may be caused by carrying heavy stones using the truck in the mine. In the alternative, the plaintiff alleges that the defendant as the employer is liable for compensation in terms of section 29 of Compensation for Occupational Injuries and Diseases Act 1993 (COIDA), for the injuries sustained by the plaintiff during the scope of his employment.
- [4] The plaintiff alleges that as a result of the pain and injuries he had sustained, he claims against the defendant damages and compensation in the amount of R3 500 000.00. The breakdown of this amount is that R1 500 000.00 is for the pains and suffering and/or alternatively for the injuries sustained during the scope of his employment. In the alternative the plaintiff is seeking payment for damages arising from the delictual claim as he had suffered pain as a result of the injury on duty and the pain is recurring on continual basis. The plaintiff

further claims damages and compensation for past medical expenses, future medical expenses, loss of future and past earnings. The balance of R2 000 000.00 is for pain and suffering, loss of income because he is no longer able to carry out heavy duties, drive a heavy loaded truck, and cannot drive for a long time, which makes it difficult for him to look for employment of a similar nature elsewhere due to ill-health.

[5] The defendant had raised an exception against the plaintiff's particulars of claim and had attacked them on eight grounds, but at the hearing of the exception had confined itself to six grounds. On the first ground the defendant alleges that it is unclear whether the plaintiff's claim is founded on delict or in statutory non-compliance in that the particulars of claim (i) alleges negligence, which is an element of delict, as well as the contravention of a statute; and (ii) contain a claim for damages as well as for compensation. In terms of section 22 of COIDA, an employee who meets with an accident resulting in his disablement is entitled to benefits provided for and prescribed in COIDA. In terms of section 35 of COIDA, an employee cannot bring an action against an employer for damages in respect of any occupational injury or disease resulting in the disablement of the employee, and an employer shall not be liable for compensation except under the provisions of COIDA. Regardless of whether the claim is founded in delict, statutory non-compliance of section 29 of COIDA, the particulars of claim are bad in law and do not disclose a cause of action. Alternatively, the particulars of claim are so vague as to cause the defendant embarrassment if it were to plead.

[6] On the second ground, the defendant has stated that the plaintiff in his particulars of claim alleges that his claim lies against the defendant's negligence and failure to comply with sections 8(1) and 8(2) of the Occupational Health and Safety Act and Regulation (OHSA). The defendant alleges that to the extent the plaintiff's claim is founded in the contravention of OHSA, it is bad in law and does not disclose a cause of action in that (i) the definition of workplace in section 1 of OHSA provides that OHSA does not apply in respect of a mine, a mining area or any works defined in the Mineral Act 50 of 1991; and (ii) the particulars of claim state that the plaintiff was

employed at the mine. Therefore, the particulars of claim do not disclose a cause of action.

- [7] On the third ground the defendant has stated that to the extend the plaintiff's claim is based on OHSA, section 8 of OHSA cannot found a damage claim as non-compliance with OHSA is provided for in section 38 of OHSA which creates criminal liability, as opposed to civil liability. Therefore, the particulars of claim are bad in law and do not disclose a cause of action. On the fourth ground, the defendant had stated that to the extend that the plaintiff's claim is based on OHSA, the particulars of claim do not adequately set out (i) the nature and scope of the statutory duties alleged; (ii) the manner in which the defendant breached such duties; and (iii) the grounds of negligence on which the plaintiff relies for the alleged damages claimed. Therefore, the particulars of claim are so vague as to cause the defendant embarrassment if it were to plead.
- [8] On the fifth ground, the defendant had stated that to the extend that the plaintiff's claim is a delictual claim, (i) the particulars of claim do not allege the respects in which the defendant's conduct was wrongful; (ii) the particulars of claim do not allege the respects in which the defendant was negligent towards the plaintiff; and (iii) the particulars of claim do not allege all relevant allegations pertaining to causation in that it is not alleged when the defendant's alleged conduct took place in relation to when the plaintiff's alleged pain and injuries took place. Therefore, the particulars of claim do not disclose a cause of action, alternatively they are so vague that the defendant would be embarrassed if it were to plead.
- [9] On the sixth ground, the defendant has stated that in terms of rule 10 of the Rules, the plaintiff is required to set out his damages in a manner that enables the defendant reasonably to assess the quantum. In paragraph 15 of the particulars of claim, the plaintiff claims damages and compensation in the amount of R3 500 000.00. According to paragraph 15.1, the amount of R1 500 000.00 is for pain and suffering, alternatively for injuries sustained during the scope of the plaintiff's employment. In paragraph 15.2, the

particulars of claim state that in the alternative the plaintiff seeks payment because he suffers recurring pain as a result of the injury on duty and he claims damages and compensation for past medical expenses, future medical expenses and loss of future and past earnings. In paragraph 15.3 the plaintiff claims R2 000 000.00 for pain and suffering and loss of income. The defendant cannot reasonably assess the quantum of the damages as it is not explained and it is not clear how the amount is arrived at. Therefore, the particulars of claim do not disclose a cause of action, alternatively are so vague that the defendant would be embarrassed if it were to plead.

[10] On the first ground of the exception, the plaintiff had submitted that it is ill-conceived, baseless and without any legal foundation, in that the plaintiff had in an unambiguous term pleaded cumulatively from the same facts a claim based on delict and a claim based on contravention of statute in the particulars of claim. The claim for compensation is in terms of the sections of COIDA for injuries sustained by the plaintiff during the scope of his employment is pleaded in the alternative. There is nothing in law that prevent the defendant from pleading different causes of action cumulatively from the same facts. The plaintiff is relying on the case of *Churchill v The Premier of Mpumalanga and Another*¹. The defendant's act of causing the injuries to the plaintiff was a risk incidental to his employment. The plaintiff's injuries did not arise out of his employment but instead arose or occurred in the course and scope of his employment. The allegations set out in paragraph 6 of the plaintiff's particulars of claim are two-fold, the first one is based on the claim against the defendant's negligence, whilst the other claim is based against the defendant's failure to comply with the provisions of OHSA.

[11] On the second ground the plaintiff has submitted that the defendant cannot rely on the Minerals Act 50 of 1991 in that the Act has been repealed by the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA). Even if the Minerals Act was found to be applicable, the OHSA says it shall

¹ [2021] ZASCA 16; 2021 (4) SA 422 (SCA) (4 March 2021)

not apply in respect of a mine, mining area or any works defined in the Minerals Act, except in so far as the Act provides otherwise.

- [12] On the third ground the plaintiff has submitted that the defendant fails to understand that the non-compliance with OHSA referred in section 38 of the OHSA does not only pertains to the non-compliance which could result in criminal liability as opposed to civil liability. Section 38 of the OHSA cannot exonerate the defendant from being liable for damages claimed as the defendant is a juristic person which cannot serve an imprisonment term similar to a natural person wherein it is found to have failed to comply with the provisions of the OHSA. Therefore, the only basis upon which the plaintiff can seek appropriate legal remedy is to claim damages from the defendant.
- [13] On the fourth ground the plaintiff has stated that the particulars of claim adequately set out the nature and scope of the statutory duties alleged, the manner in which the defendant had breached and, the grounds of negligence of which the plaintiff relies on the alleged damages claimed. On the fifth ground, the plaintiff has stated that whilst the plaintiff did not state verbatim the elements of delict, the plaintiff had covered the circumstances which by implication or design, directly or indirectly proves the essential elements of delict such as negligence, wrongfulness and causation.
- [14] On the sixth ground, the plaintiff has submitted that its main focus now is to deal with the merits of the case, and deal with the quantum at a later stage wherein further facts would be clearly set out in a separate hearing for determination of quantum. When that happens, the plaintiff would be better placed to take the defendant through the figures and how such an amount was determined or calculated and why different amounts are claimed for the same heads of damages. It is premature for the defendant to expect the extrapolation or assessment of damages by the plaintiff in order to plead.
- [15] 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. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity. In *Living Hands v Ditz*² Makgoka J said:

“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 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.

² 2013 (2) SA 368 (GSJ) at para 15

(g) Minor blemishes and unradical embarrassment caused by a pleading can and should be cured by further particulars”.

- [16] The plaintiff is claiming compensation and/or damages against the plaintiff. A claim for compensation will be based on the applicable statute, and a claim for damages will be based on delict. The plaintiff’s particulars of claim have been poorly drafted in that it has not been set clearly as to which are the grounds upon which compensation is claimed, and the grounds upon which damages are claimed. It is also not clear which claim is the main or alternative. Paragraph 15.2 of the plaintiff’s particulars of claim provides as follows:

“In the alternative, the plaintiff seeks payment for damages arising from the delictual claim simply because, he suffered pain as a result of the injury on duty and this pain is recurring on continual basis. The plaintiff claims damages and compensation for past medical expenses, future medical expenses, loss of future and past earnings”.

- [17] Whilst it seems that the plaintiff is claiming damages in the alternative, he is in the same breath claiming compensation. It does not seem that the plaintiff understands the difference between a claim based on damages and compensation. The plaintiff uses both words interchangeably as if they refer to one and the same thing. A claim based on a statute had its own requirements which the plaintiff must prove in order to succeed with the claim, and also a claim based on delict has its own requirements. It must also be clear from the pleadings which claim is the main and alternative, and the grounds relying upon be clearly set out in order to enable the defendant to plead. The manner in which the plaintiff’s particulars of claim has been poorly drafted, is vague and embarrassing. Therefore, defendant’s first ground of exception has merit and stands to be upheld.

- [18] On the second ground, it also goes to the poor drafting of the plaintiff’s particulars of claim. In paragraph 6 of the plaintiff’s particulars of claim, it has been stated that the plaintiff’s claim lies against the defendant’s negligence and failure to comply with section 8(1) and 8(2) of OHSA. The plaintiff in his

particulars of claim has stated that he was employed as a truck driver by Anglo American Platinum Mine. In terms section 1(3) of OHSA, the Act shall not apply in respect of a mine, mining area or any works as defined in the Minerals Act 50 of 1991. The Minerals Act has been repealed by the Petroleum Resources Development Act 28 of 2002 which has not in any way affected section 1(3) of OHSA. The plaintiff has been employed in a mine or mining area, and therefore, reliance on the provision of OHSA will result in no cause of action being disclosed against the defendant. The defendant's second ground has merit and stands to be upheld.

[19] Regarding the third ground, non-compliance with the provisions of OHSA does not give rise to a claim for compensation. Section 38 of OHSA creates a criminal offence for non-compliance with the provisions of that Act, and there are certain fixed penalties which the criminal court may impose in case of conviction. There is no provision for civil liability. The plaintiff's reliance on section 8 of OHSA renders his particulars of claim not to disclose a cause of action, and the defendant's third ground stands to be upheld.

[20] Regarding the fourth ground, the plaintiff in his particulars of claim had quoted section 8(1) and 8(2) of OHSA. The plaintiff thereafter stated that the defendant had contravened the provisions of OHSA by causing the plaintiff to drive the heavy load truck during night shift against doctor's recommendations who had recommended day shift or light duty. The plaintiff has stated in his particulars of claim that the defendant had negligently subjected plaintiff to drive heavy load truck during night shift, and was not conducive or suitable to the plaintiff resulting in him being severely injured or rather suffering and enduring pains on the back of his body, his neck and right arm. Further that the defendant failed to ensure that the working environment and the heavy load truck was safe for use and to maintain or put precautionary measures to ameliorate any potential pain and suffering or ill-health which may be caused by heavy stones using the truck in the mine. If the OHSA was creating civil liability for non-compliance with its provisions, reading the particulars of claim as a whole in relation to the claim based on OHSA, the pleading is not so

vague as to enable the defendant to plead. There is no merit on the defendant's fourth ground.

[21] The plaintiff claim is also based on delict, and is therefore required to plead all the essential elements of delict which are wrongfulness, negligence and causation. The plaintiff in his particulars of claim has pleaded that the defendant had negligently subjected the plaintiff to drive heavy load truck during night shift, and that was not conducive or suitable to the plaintiff. Further that defendant had failed to ensure that the working environment and heavy load truck was safe for use, and to maintain or put precautionary measures to ameliorate pain and suffering. All these constitute the defendant's alleged failure to comply with safety standards which amounts to an omission. The defendant must go further and show in what respect was the alleged omission wrongful by pleading facts which render the alleged omission to be wrongful. Throughout the plaintiff's particulars of claim there is nowhere the plaintiff makes mention of wrongfulness or facts which shows elements of wrongfulness. The plaintiff has also failed to set out the facts giving rise to the alleged negligence by the defendant. The plaintiff's particulars of claim are vague and the defendant's fifth ground has merit.

[22] On the sixth ground the plaintiff is basically conceding to the defendant's complaint. The plaintiff's in his heads of argument has submitted that at this stage his main focus is to deal with the merits of the case and deal with quantum at a later stage wherein further evidence and material facts would be clearly set out in a separate hearing for determination of quantum. Further that when that time arrives, the plaintiff would be better placed to take the defendant through the figures and show how such an amount was determined or calculated and why the different amounts are claimed for the same head of damages.

[23] Rule 18(4) of the Uniform Rules of Court provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply

thereto. There is no provision for a piecemeal pleading where clear and concise material facts will first be pleaded on merits, and for quantum to be pleaded later after determination of merits. What the plaintiff is submitting is that the defendant in relation to quantum must file a provisional plea or not plead, and will file a proper plea after merits has been finalised. This argument is flawed, as it is not given that in every matter separation of merits and quantum will be granted. The plaintiff's particulars of claim on this issue is vague, and therefore the defendant's sixth ground has merits.

[24] Where an exception has been granted on the ground that the pleading is vague and embarrassing, that strikes at the formation of the cause of action and not its legal validity. (See *Trope and Others v South African Reserve Bank*³) In such situations the normal practice will be to give the affected party leave to file an amended pleading within a specified time period. Except for one ground, the defendant's exception has been upheld on the grounds that the plaintiff's pleading is vague and embarrassing. It will therefore be fair and just to grant the plaintiff leave to amend his particulars of claim.

[25] In the result the following order is made:

25.1 The defendant's exception is upheld with costs.

25.2 The plaintiff is granted leave to deliver, within fifteen (15) court days, a notice to amend his particulars of claim.

25.3 In the event the plaintiff falling to deliver a notice of intention to amend his particulars of claim within the time period set out 25.2 above, the plaintiff will be entitled to bring an application for dismissal of the plaintiff's claim.

KGANYAGO J

³ 1993 (3) SA 264 (A) at 269I

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES:

Counsel for defendant/excipient	: Adv K Thobakgale
Instructed by	: Cliffe Dekker Hofmeyr Inc
Counsel for the plaintiff	: Adv N Moropene
Instructed by	: Lesiba Mailula Attorneys Inc
Date heard	: 6th March 2025
Electronically circulated on	: 16th April 2025