

MARK DUANE HIBBERD obo JORDAN DEVAN HIBBERD Plaintiff

and

PA DIPPENAAR INVESTMENTS CC 1st Defendant

DISA HARDWARE DISTRIBUTORS (PTY) LTD 2nd Defendant

ALOE PLUMBING & HARDWARE SUPPLIES CC 3rd Defendant

JUDGMENT

PILLAY AJ

1. This argument on exception was before me on 31 October 2019. A Rule 33(4) application was removed from the roll on the same day with the Plaintiff to pay the wasted costs. Judgment was reserved on the exception. This judgment deals with the exception.
2. The Plaintiff claimed for damages in delict (aquilian action) as well as in terms of the Consumer Protection Act, 68 of 2008 (“**CPA**”). The claim is founded on alleged injuries suffered by the Plaintiff’s minor son arising from clinical burns.

3. The First Defendant is the excipient ("**Dippenaar**") in these proceedings. The Second Defendant ("**Disa**") while it raised an exception to the particulars of claim ("**POC**"), did not appear. I deal only with Dippenaar in this judgment.

4. The Plaintiff attempted to amend its POC twice. These attempts were opposed by Dippenaar. The Plaintiff has taken no further steps to amend the POC.

Dippenaar's general case

5. Dippenaar raises the following:
 - 5.1 The POC does not disclose a cause of action in respect of the acquilian claim in that it lacks essential averments to sustain a cause of action in delict based on an omission;

 - 5.2 In respect of the statutory claim, it is incompetent in that it lacks any allegation to establish a vital jurisdictional fact, namely that the Plaintiff has exhausted his remedies provided for in the CPA;

 - 5.3 The POC is vague and embarrassing in several respects;

5.4 The POC offends against the provisions of Rule 18(10).

The Notices

6. The Plaintiff claims for damages of R27 500 000.00 against Dippenaar, *alternatively* Disa, *alternatively* Aloe jointly and severally. There are two claims. The Plaintiff titled the first claim "*Plaintiff's claim based on common law negligence*". It deals with this at paragraphs 10 to 13 of the POC.
7. It titles its second claim "*Plaintiff's claim based on the Consumer Protection Act, 68 of 2008*". This is dealt with seemingly at paragraphs 14 to 17.
8. Apparent from the POC, the claims are not formulated in the alternative.
9. Dippenaar filed Notices to remove causes of complaint:
 - 9.1 Due to the POC offending against the provisions of Rule 18(10) – Rule 30(2)(b); and

- 9.2 In terms of Rule 23(1). The Rule 23(1) notice was for POC being vague and embarrassing and that it did not disclose a cause of action
10. Dippenaar claims that the POC lacks particularity in that the Plaintiff fails to set out its alleged damages in a manner that will enable Dippenaar reasonably to assess the quantum thereof.
11. It further contends that the POC offends against Rule 18(10) and lacks particularity in that the Plaintiff has to :
- 11.1 specify his date of birth;
- 11.2 specify the nature and extent of the injuries;
- 11.3 Specify the nature, effects and duration of the disability alleged to give rise to the damages claimed for personal injuries;
- 11.4 The Plaintiff, as far as is practical has failed to state separately what amount, if any is claimed for:

- (i) Medical costs and hospital and other similar expenses and how these costs and expenses are made up;
 - (ii) Pain and suffering, stating whether the temporary or permanent and which injuries caused it;
 - (iii) Disability, stating whether the disability concerned is temporary or permanent in respect of the earning of income and the enjoyment of amenities of life; and
 - (iv) Disfigurement with a full description thereof and stating whether it is temporary or permanent.
12. Dippenaar went on that it is unfairly, unjustly and substantially prejudiced in determining what case it has to meet, and to present its plea.
13. Dippenaar further excepts to the POC on the grounds that it is vague and embarrassing in that:

13.1 The Plaintiff gave no particularity as to the nature of the drain cleaner which the Plaintiff referred to as "*the product*", save to plead that it was composed of sulphuric acid of a very high concentration of approximately 90% sulphuric acid. This suggested that the product is probably a liquid similar to sulphuric acid;

13.2 At the same time in paragraph 7 of the POC the Plaintiff pleaded that the product was manufactured by Dippenaar, and the product was made available to the public by displaying same on an easily accessible shelf in the hardware shop. The Plaintiff went on that "*considering the dangerous nature of the product, they failed to attach adequate warning labels on the product*".

13.3 This in contradiction suggested that the product is ostensibly not a liquid, most probably a solid object with some or other kind capable of being manufactured, displayed on a shelf and having labels attached to it;

13.4 Dippenaar in turn pleaded that the POC lacked particularity as to the product to the extent that it amounts to vagueness in that it is inconsistent to such an extent that it amounts to a contradiction.

14. In paragraph 7 of the POC the Plaintiff pleaded that the product was manufactured by Dippenaar, advertised and presented *via* catalogues (amongst other means) and distributed by Disa and Aloe. Dippenaar claimed that this was opened to two meanings:

14.1 That Dippenaar advertised and presented the product via catalogues to Disa who then distributed to Aloe; or

14.2 Disa advertised it and presented the product via catalogues and distributed it to Aloe.

15. In paragraph 10 read with paragraph 10.2 of the POC the Plaintiff pleads that the minor child's injuries were caused when the nozzle of the bottle of the product fell out during use, and the subsequent injuries were solely caused by the First Defendant in that they manufactured a product fitted with a very small nozzle which allows only a very small amount of the product to come out. The Plaintiff pleads no further particularity in respect of the reference to "*a product*", save to plead that the design constituted a very serious designed flaw in its delivery system, which is likely to cause harm as the user of the product is effectively encouraged to

squeeze the product bottle to use the product, which design has the potential to fail catastrophically.

16. The Plaintiff pleads no further particularity as to the nature and extent of the “*design flaw*”, the “*potential to fail catastrophically*” and how it is “*likely to cause harm*”. Those details are left to the imagination and speculation of the Defendants. Dippenaar hence went on that it is unclear as to whether Dippenaar is also the manufacturer of either the bottle in which the drain cleaner is packaged or the “*nozzle*” or both.
17. In paragraph 10 of the POC the Plaintiff pleads that the incident and subsequent injuries were caused solely by the negligence of Dippenaar, *alternatively* the agent and/or independent contractors of the Defendant, *alternatively* executive members of the Defendant who were negligent. The Plaintiff fails to plead further particularity in respect of who the agents and/or independent contractors and/or executive members of the Defendant is.
18. The Plaintiff also failed to provide particulars as to what is meant by reference to “*the Defendant*”. It is not clear whether this is a reference to Dippenaar, Disa, Aloe, only one of them and if so, which one. It was also

not clear whether the Plaintiff intended to plead that Disa and Aloe or any of them were the agents and/or independent brokers of Dippenaar.

19. The reference to “agents” and “independent contractors” is ostensibly an attempt to allege vicarious liability. It is not clear the basis for which vicarious liability is ostensibly alleged. Also for that matter why any of the Defendants is an agent and/or independent contractor. For this reason, Dippenaar asserts that it is not possible to determine for the purpose of pleading who is referred to and what the relationship, legal or otherwise existed between any of them and Dippenaar, or any of the other Defendants.
20. Dippenaar goes further that the Applicant at paragraph 10.4 of the POC pleads that “they failed to take measures to avoid the incident”. The Plaintiff fails to plead any particularity as to the nature and extent of any “measures” that must reasonably be expected to have been taken to avoid the incident.
21. The Plaintiff at paragraph 10 of the POC pleads that the incident and subsequent injuries was caused solely by the negligence of Dippenaar, *alternatively* the agents and/or independent contractors of the

“Defendant”, alternatively the executive members of the *“Defendant”* who were negligent.

22. In paragraph of the POC the Plaintiff pleads that the incident occurred due to the sole negligence of Dippenaar and/or its agents, independent contractors or executive members. The Plaintiff did not refer to the agents, independent contractors and executive members in the alternative. For this reason, paragraphs 10 and 11 of the POC are a contradiction. The factual versions on such allegations are incompatible and mutually exclusive. In addition, reference is made to *“the Defendant”* without specifying which Defendant the Plaintiff is referring to.
23. The Plaintiff fails to plead in particularity as to how the drain cleaner was used and how the accident/incident occurred.
24. In paragraphs 2, 3 and 4 of the POC the Plaintiff pleads that Dippenaar would sometimes be referred to as *“the manufacturer”*. The same applied to Disa, who would sometimes be referred to as *“the distributor”*, and the Third Respondent who would sometimes be referred to as *“the retailer”*. This however was in conflict with paragraph 7 of the POC.

25. The Plaintiffs purportedly instituted claims based on two different causes of action, being:
- (i) The *acquilian* action; and
 - (ii) An alleged transgression of the CPA. The claims are not pleaded in the alternative, in particular not against Dippenaar. The claims are exclusive of one another.
26. In paragraph 14 of the POC the Plaintiff fails to specify which definition or definitions referred to therein he claims to be applicable to which of the Defendants, and in particular, Dippenaar in respect of the product, it be the sulphuric acid drain cleaner.
27. In paragraph 15 read with paragraph 15.1 of the POC the Plaintiff pleads that the Defendants "*jointly and severally*" failed to comply with the provisions of the CPA by manufacturing a defective product. This is in conflict with any allegation that may be construed from the POC to mean that Dippenaar was the sole manufacturer of the drain cleaner to the exclusion of any of the other Defendants.

28. Dippenaar claims that it is unfairly, unjustly and substantially prejudiced in determining which case it has to meet, and to present its defence in its plea.

The pleaded exception on the duty of care by omission

29. Dippenaar claims that the POC is vague and embarrassing.
30. Insofar as the aquilian claim is concerned, paragraph 11 of the POC is essentially the breach of a duty of care due to omissions. In order to establish aquilian liability a Plaintiff whose claim is based on a breach of a duty by omission has to make averments as to:

30.1 The nature and extent of the duty of care;

30.2 Who the duty of care is owed to;

30.3 The origin/source of the duty of care.

31. The Plaintiff failed to make the necessary averments as to:

31.1 The nature and extent of any alleged duty of care of Dippenaar;

31.2 Whom the duty of care is owed to;

31.3 The original source of Dippenaar's alleged duty of care;

31.4 Wrongfulness.

32. Insofar as the statutory claim is concerned, the Plaintiff's POC lacks the necessary averments to sustain any claim in respect of the CPA. The CPA provides for adjudication of disputes by the National Consumer Tribunal, an Ombud, a Consumer Court, an alternative dispute resolution agent or the National Consumer Commissioner. It has not been alleged that the Plaintiff exhausted his internal remedies in respect of these tribunals, and the statutory claim seems bad in law.
33. The statutory claim purports to in essence be based upon the claim that the product suffered from a designed flaw in its delivery system, which rendered the product defective. However, there is no allegation that Dippenaar designed the product and/or was in any way responsible for the purportedly alleged defected design. No allegation made causally links Dippenaar to the alleged design flaw. There is also, insofar as it is

the intention to base the claim upon a flaw in the actual manufacturing of the bottle, no allegation to this end, not as to the extent and nature of the flaw in the manufacturing process.

ANALYSIS

The pleaded exception on the statutory claim

34. The Plaintiff seeks to rely on an infringement of section 54(1)(c) and 55(2) of the CPA in paragraph 15 of the POC.
35. Section 69 of the CPA provides that a person may approach the Court if all other available remedies have been exhausted. The CPA in turn has provided various remedies including for example the Consumer Tribunal and Ombudsman.
36. In *Chirwa v Transnet Ltd & Others 2008(4) SA 367 (CC)* the Constitutional Court held that where a specialized framework has been created for the resolution of disputes, the parties must pursue their claims primarily through such mechanisms.
37. In *Joroy 4440 CC v Potgieter 2016(3) SA 465 (FB)* it was held the wording of section 69(d) is clear and unambiguous. The consumer may

approach the Court if all the avenues of redress provided had been exhausted. This being so, the CPA creates a necessary jurisdictional fact that must exist before this Court may entertain the matter.

38. The CPA creates a mechanism for resolution of disputes. This is not in dispute. It is also common cause that the Plaintiff has not exhausted all remedies available to it. This being so, this Court does not have jurisdiction to entertain the Plaintiff's statutory claim.
39. The Plaintiff's stance is that jurisdiction can be found to exist in due course. This is correct. In my view however the statutory claim cannot be initiated before the jurisdictional facts for same exist. To do so would render the action premature.
40. The Plaintiff cannot make the essential factual allegation to establish jurisdiction and hence a cause of action. This Court does not have jurisdiction to entertain the Plaintiff's statutory claim as currently initiated.
41. Dippenaar's exception on this score must succeed. Insofar as the statutory claim is concerned, it cannot be remedied by an amendment to the pleadings. The exception to the statutory is therefore upheld. The statutory claim is dismissed.

The pleaded exception on the acquilian claim

Duty of care by omission

42. The Plaintiff's claim is based on an omission to act in terms of a duty of care. Dippenaar contends that the POC is excipiable because it does not contain an allegation as to wrongfulness, the nature and extent of the legal duty, to whom it is owed and the source/origin of the duty.

43. Where there is a claim for liability due to an omission and through economic loss, wrongfulness is not presumed. It depends on the existence of a legal duty. The Court must therefore determine whether the duty exists. The Plaintiff had to set out criteria for the Court to find that there is a legal duty. The legal duty is a separate enquiry from that of negligence and causation.

44. The POC has failed to set out any allegation as to the nature and extent of the alleged legal duty, if it does indeed exist, the source and origin of same, or to whom it is owed. There is also no allegation that there was a breach of a legal duty that was wrongful.

45. A Plaintiff is required to do more than merely describe the nature of a legal duty. The basis for the claim must also be provided. The basis for the duty must be averred. Paragraphs 12 does not lend to the reading contended for by the Plaintiff.
46. I agree with Dippenaar that no cause of action is made in delict based on duty of care by omission. The Plaintiff has failed to plead allegations as to wrongfulness, the nature and extent of the legal duty, to whom it is owed and the source and origin of same.
47. This exception must therefore be upheld. The Plaintiff will be granted 15 days to amend its POC insofar as the acquilian claim is concerned.

Vague and embarrassing: non-compliance with rule 18(10)

48. The POC pleads both an acquilian and statutory claims. The statutory claim is bad in law. I therefore need not concern myself with the failure to plead the claims in the alternative.
49. The POC refers to *inter alia* agents and/or independent contractors of “*the Defendant*”. Dippenaar Investments is correct in its assertion that it

cannot assess who the Plaintiff refers to. The Plaintiff has in various paragraphs referred to the Defendants in a manner that makes their characterization unclear. The Plaintiff does not distinguish between the three Defendants and the role each plays in its claim. For instance, it is not clear whether Dippenaar is the producer, manufacturer, distributor and/or all of the above. This is vague and embarrassing and strikes to the root of the cause of action. Dippenaar is unable to meaningfully respond to same.

50. This will invariably prejudice Dippenaar in determining the case it has to meet and how to plead its defence. The POC to this extent is ambiguous and strikes at the root of the causes of action. It is vague and embarrassing. This exception is upheld.

51. The Plaintiff's claim relates to the failure of the "*Product*". It however does not set out what this "*Product*" is. At one stage it appears to be a liquid product that comprises mostly of sulphuric acid. At another stage the product appears to be a bottle or container. In this regard the claim seems to be that the "*Product*" is possibly a bottle/container which has a nozzle. The Plaintiff further suggests that the nozzle (opposed to the liquid Product) constitutes a serious design flaw in its delivery system.

52. These are contradictory and severely prejudices Dippenaar in its ability to respond to the POC. It strikes at the root of the cause of action. I am in agreement with Dippenaar that this renders the POC vague and embarrassing. This exception must be upheld. The Plaintiff will be provided with time to amend its POC if it desires.

53. Rule 18(10) sets out the particularity that must be provided in a claim for personal damages. The Plaintiff provides estimates. This does not however prejudice Dippenaar to an extent that it cannot plead. While it would be prudent for the Plaintiff to remedy this, this exception is sustainable to the degree that is required. This exception is dismissed.

54. The Plaintiff has not provided particularity such as the minor child's date of birth, the nature and extent of injuries, the nature and effects of the alleged disability. He will be given the opportunity to do so if he so desires.

Costs

55. Dippenaar has been successful on all but one ground. There is no reason that it should be deprived of costs.

ORDER

56. In the circumstances I make an order in the following terms:

- (a) The exception in respect of the statutory claim is upheld. The statutory claim is dismissed.
- (b) The exceptions in respect of the delictual claims are upheld. The Plaintiff is given 15 court days to deliver amended particulars of claim if he so desires.
- (c) The Plaintiff is to pay the First Defendant's costs.

L PILLAY
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Date of judgment: 13 August 2020

Attorneys for the Excipient:

Dippenaar-Nieuwoudt Spector Attorneys

Per: Zuzette Dippenaar-Nieuwoudt

Email: dnsattorneys@gmail.com

Attorneys for the Respondent:

Dyason Attorneys

Per: Cindy Horn

Email: cindy@dyason.co.za