

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 35188/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED YES.

DATE 22 November 2023

SIGNATURE

In the matter between

**SHIREEN ISMAIL**

Plaintiff

and

**LENMED HEALTH ZAMOKUHLE**

First Defendant

**ARWP MEDICAL CENTRE**

Second Defendant

**SUNWARD PARK HOSPITAL**

Third Defendant

**MILPARK HOSPITAL**

Fourth Defendant

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**J U D G M E N T**

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## **WANLESS AJ**

### **Introduction**

- [1] During or about October 2022, one Shireen Ismail, adult female (*"the Plaintiff"*), instituted an action (*"the action"*), in this Court on behalf of her husband, one Shareen Ismail, adult male (*"the patient"*). In the action the Plaintiff claimed damages, jointly and severally the one paying the others to be absolved, against Lenmed Health Zamokuhle, a private company operating as a private hospital (*"the First Defendant"*); ARWYP Medical Centre, a private company operating as a private hospital (*"the Second Defendant"*); Sunward Park Hospital, a private hospital (*"the Third Defendant"*) and Milpark Hospital, a private hospital (*"the Fourth Defendant"*).
- [2] Both the First Defendant and the Second Defendant have taken exception to the Plaintiff's Particulars of Claim. Two (2) separate applications have been combined with the consent of the Deputy Judge President of this Division to be heard as a single Opposed Motion under case number 035188/2022.

### **Grounds of exception**

[3] The First Defendant's exception is based upon the fact that the Particulars of Claim fail to disclose a cause of action and are vague and embarrassing whilst the exception of the Second Defendant is based on the ground of failing to disclose a cause of action only.

### **An analysis of the Plaintiff's Particulars of Claim**

[4] The factual narrative pleaded in the Particulars of Claim and upon which this application was argued before this Court, can be summarised as follows:

4.1 on 19 November 2019 the patient was transported, by ambulance, to the First Defendant hospital, allegedly suffering a cardiac arrest;

4.2 upon arrival at the First Defendant hospital the patient was resuscitated and stabilised to be transported to the Third Defendant hospital by ambulance;

4.3 *en route* to the Third Defendant hospital the patient allegedly suffered another cardiac arrest, upon

which the ambulance re-routed to the Second Defendant hospital being closer to the vicinity of the ambulance at that stage;

4.4 upon arrival at the Second Defendant hospital the patient was treated and thereafter airlifted to the Third Defendant hospital;

4.5 after arriving at the Third Defendant hospital the patient was treated by a cardiologist and underwent a surgical intervention;

4.6 some two days later the patient was transferred to the Fourth Defendant hospital via ambulance; and

4.7 the patient underwent a number of procedures over a period of time at the Fourth Defendant hospital and was eventually discharged some three months later to a frail care facility.

**The First Defendant's exception based on the ground that the Plaintiff's Particulars of Claim are vague and embarrassing**

[5] As correctly pointed out by Counsel for the First Defendant the Plaintiff's Particulars of Claim contain mutually destructive statements. In paragraph 8 it is pleaded:

*"Upon arrival at the Zamokuhle hospital, an initial*

*assessment was done by medical staff whose full particulars are unknown. The patient was resuscitated and stabilised and thereafter transferred via ambulance to Netcare t/a Sunward Park Hospital: "Sunward Park Hospital", as there were no cardiologists available at the hospital."*<sup>1</sup>

[6] Thereafter, in subparagraph 45.1 the Plaintiff alleges that:

*"The First Defendant failed to stabilise the patient using the required skill, care and procedure before transferring him via ambulance".*<sup>2</sup>

[7] It is trite that a plaintiff is entitled to rely on mutually contradictory averments in his particulars of claim, provided that it is clear from the manner of pleading them that he is only relying on the one in the event that the other is not sustainable.<sup>3</sup>

[8] In the present matter that proviso is clearly absent and for that reason the foregoing contradiction must render the Plaintiff's Particulars of Claim as against the First Defendant

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<sup>1</sup> *Emphasis added*

<sup>2</sup> *Emphasis added*

<sup>3</sup> *Feldman NO v EMI Music SA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd 2010 (1) SA 1 (SCA) at paragraph 11*

vague and embarrassing.

**The First Defendant's and Second Defendant's exceptions based on the ground that the Plaintiff's Particulars of Claim do not sustain a cause of action**

[9] Both the First Defendant and the Second Defendant have taken exception to the Plaintiff's Particulars of Claim on the ground that the Particulars of Claim do not sustain a cause of action in respect of them. In that regard, both of these defendant's rely upon the same submission that, in terms of various legislation, with particular reference to, *inter alia*, the Health Professions Act 56 of 1974; the National Health Act 61 of 2003 and the regulations promulgated thereof, together with The Ethical and Professional Rules of the Health Professions Council of South Africa GN R717, 4 August 2006 (as amended by GN NO R68 of 2 February 2009), medical practitioners cannot be in the employ of a private hospital for the purposes of rendering clinical services to patients.

[10] During the course of argument before this Court the Plaintiff's counsel conceded (correctly in the opinion of this Court) that the legal consequence of the foregoing was that none of the defendants in the present matter, with particular

reference to the First and Second Defendants, can be held responsible, either directly or vicariously, for the conduct of any of the patient's medical practitioners. However, Plaintiff's Counsel sought to avoid the consequences thereof by submitting to this Court that, despite the foregoing, the Plaintiff's Particulars of Claim did sustain a cause of action since the Plaintiff does not rely on vicarious liability in respect of the actions of various medical practitioners.

[11] As correctly pointed out by both Counsel for the First and Second Defendants, this is clearly not so. In paragraph 43 of the Plaintiff's Particulars of Claim, under the heading of "*Vicarious Obligations*" the Plaintiff sets out her reliance upon the vicarious liability of all five defendants arising from the medical practitioners' and nursing staffs' relationships with the defendants as set out in subparagraphs 43.1 and 43.2. In the premises, this Court holds that the Plaintiff's Particulars of Claim must be expiable for the foregoing reasons and on the ground that they do not sustain a cause of action.

[12] Further, both the First Defendant and the Second Defendant take exception to the Plaintiff's Particulars of Claim on the ground that, even if it is accepted that these defendants

employed the nursing staff as averred, in terms of the Nursing Act 30 of 2005, <sup>4</sup> those nurses are limited in the scope of the care they can provide and are specifically precluded from conducting procedures on a patient. This Court also understood (correctly) Plaintiff's Counsel to accept the reliance by both defendants upon this particular legislation and the provisions thereof. This further supports the excipiability of the Plaintiff's Particulars of Claim on the ground of failing to sustain a cause of action against both the First Defendant and the Second Defendant.

[13] In addition to the foregoing, both the First Defendant and the Second Defendant have cited, individually, instances where it is averred that the Plaintiff's Particulars of Claim do not sustain a cause of action as against them. In both their Heads of Argument and during the course of argument before this Court, both Counsel for both defendants referred this Court meticulously to those instances and the general paucity of the pleadings insofar as the Particulars of Claim lack any real mention or detail of either defendant therein.

[14] At this stage, it is particularly apt to recall the century-old but still highly relevant words of the erstwhile Appellate Division in the matter of *McKenzie v Farmer's Co-operative*

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<sup>4</sup> Section 56



*Meat Industries Ltd* <sup>5</sup> where <sup>6</sup> the Court, when setting out what constitutes a "cause of action", held:

*"... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his rights to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*

[15] The criticism levelled by both Counsel for these defendants against the Plaintiff's Particulars of Claim, can be broadly summarised as follows:

15.1 the paucity of the allegations in the Particulars of Claim referring to either the First or Second Defendant. Rather, the Plaintiff has elected to make a number of general allegations against all five defendants and has failed to indicate which defendant is to be held liable for which conduct;

15.2 the failure of the Plaintiff to properly plead her cause of action either in contract or in delict or in both (in the alternative).

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<sup>5</sup> 1922 AD 16

<sup>6</sup> At 23

[16] Following a careful examination by this Court of (a) the averments in the Particulars of Claim where reference is made to the First Defendant and (b) the complications the Plaintiff alleges the patient suffered as set out in the Particulars of Claim, it is clear that the Plaintiff has failed to elucidate, in her Particulars of Claim, how the First Defendant's alleged negligence caused or contributed to the pleaded complications allegedly suffered by the patient. As correctly submitted by the First Defendant's Counsel, it becomes apparent that the complications as pleaded are in fact attributed to have been caused by parties other than the First Defendant or occurred at facilities other than the First Defendant, as cited in the Particulars of Claim.

[17] From the foregoing, it becomes evident that the complications that the Plaintiff seeks to claim damages for, were in no way related to the patient's admission to the First Defendant's facility. Were these complications to be somehow causally linked to the First Defendant, then it is required that the plaintiff, in her pleadings, demonstrate that an act or omission on the part of the First Defendant is causally linked to the complications or a particular complication.

[18] This judgment will not be burdened unnecessarily by setting out the foregoing. These inadequacies were canvassed, in great detail, by Counsel for the First Defendant, both in the First Defendant's Heads of Argument and during the course of argument before this Court. Little purpose would be served to repeat them once again which would ultimately amount to a duplication of the Plaintiff's Particulars of Claim.

[19] Where the Plaintiff has attempted to make assertions of negligence against the First Defendant to sustain a cause of action in the Plaintiff's Particulars of Claim the Plaintiff has, regrettably, fared no better. Firstly, following the allegation that the First Defendant failed to stabilise the patient, there is a direct contradiction in the Particulars of Claim that the patient was resuscitated and stabilised. Secondly, in averring that the First Defendant was negligent in transferring a patient in a critical condition, such as the patient, by ambulance rather than by air, the Plaintiff's Particulars of Claim do not identify the party who elected to convey the patient via ambulance. The submission made on behalf of the First Defendant that the decision to transfer a patient falls outside the scope of practice of nurses as does the decision of the method of conveyancing of a patient to be

used, are good ones and are accepted by this Court. Also, in addition thereto, the Particulars of Claim are silent as to which, if any, of the complications would have been averted had the patient been airlifted rather than having been transferred by road. Thirdly, when averring that the First Defendant fails to prevent the patient from suffering a second cardiac arrest en route the Plaintiff has failed to state in her Particulars of Claim what the First Defendant (*or for that matter even the nurses in the First Defendant's employ*) ought to have done to prevent a second cardiac arrest. Rather, in the Particulars of Claim, it is stated that the patient was stabilised *before* the transfer was effected and that the patient was handed over to the ambulance personnel in a stable condition.

[20] The identical approach to the attack mounted at the Plaintiff's Particulars of Claim by the First Defendant was also adopted by the Second Defendant both in the Second Defendant's Heads of Argument and in the argument placed before this Court on behalf of the Second Defendant by its Counsel. As such, the same considerations apply and this Court has carried out the same careful examination as referred to earlier in this judgment.<sup>7</sup> Following same, this Court comes to the same findings in respect of the Second

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<sup>7</sup> Paragraph [16] *ibid*

Defendant as made earlier in this judgment in respect of the First Defendant.<sup>8</sup>

[21] Whilst, as held earlier herein,<sup>9</sup> little purpose would be served by this Court dealing with each and every instance where the plaintiff's Particulars of Claim failed to disclose a cause of action against the Second Defendant, it is worthy to note, as submitted by the Second Defendant's Counsel, that to appreciate the paucity of the allegations referring to or mentioning the Second Defendant, it must be noted that these are contained *entirely* in the Particulars of Claim in three subparagraphs, namely:

*"On route to Sunward Park Hospital, the patient suffered another cardiac arrest, and the ambulance re-routed to Arwyp Medical Centre. At Arwyp Medical Centre, patient was treated by medical staff whose full particulars are unknown and the patient was thereafter airlifted to Sunward Park Hospital."*<sup>10</sup>

*"Tacit agreements were concluded between the patient and the following hospitals:*

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<sup>8</sup> Paragraphs [16] to [18] *ibid*

<sup>9</sup> Paragraph [18] *ibid*

<sup>10</sup> *Emphasis added*

- (a) *Zamokuhle Hospital in Tembisa on 19 November 2019;*  
 (b) *Arwyp Hospital in Kempton Park on 19 November 2019;*  
 (c) *Netcare t/a Sunward Park Hospital in Boksburg on 19 November 2019; and*  
 (d) *Netcare t/a Milpark hospital in Johannesburg on 21 November 2019."* <sup>11</sup>

*"The First and Second Defendants failed to provide proper and careful procedures to the Patient in accordance with the standards which persons generally would be entitled to expect in the circumstances in which they practiced at the time."* <sup>12</sup>

[22] Moreover, the Plaintiff makes a number of sweeping allegations against the "defendants" but fails to indicate which "defendant" is being held responsible for any specific conduct. Examples of this include:

22.1 *"As a result of the cumulative negligent conduct of the Defendants, the patient is now in a vegetative state";*

22.2 *"The Defendants had a duty of care towards the patients to provide ..."*

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<sup>11</sup> *Emphasis added*

<sup>12</sup> *Emphasis added*

22.3 *"The complications occurred and/or continued to occur as a result of the negligence of the Defendants ..."*

[23] In the matter of *Manyatse v South African Post Office Ltd*<sup>13</sup>, Southwood J referred to the matter of *Imprefed (Pty) Ltd v National Transport Commission*<sup>14</sup> as follows:

*"It is well established that: "(T)he whole purpose of pleadings is to bring clearly to the notice of the court and the parties to the action the issue upon which reliance is to be placed"; and that: "(T)he object of pleading is to ascertain definitively what is the question at issue between the parties, and this object can only be attained when each party states his case with precision."*

[24] As also dealt with earlier in this judgment,<sup>15</sup> it is unclear whether Plaintiff's claim is pursued *ex contractu* or *ex delictu*. To this end the Plaintiff pleads the following:

*"There is a legal relationship between a hospital, its medical practitioners and staff members and a patient created by a tacit contract. The hospital, its medical*

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<sup>13</sup> [2008] 4 All SA 458 (T) at paragraph 4

<sup>14</sup> 1993 (3) SA 84 (AD)

<sup>15</sup> At subparagraph 15.2 *ibid*

*practitioners and staff members undertakes to render professional services. The medical practitioners who are employees or representatives of the defendants have a duty to exercise the reasonable skill and care of a practitioner in the field."* <sup>16</sup>

[25] Then, at a later stage, the Plaintiff alleges that:

*"The Defendants had a duty of care towards the patients to provide ..."*

The Second Defendant correctly submits that there is no rational basis alleged from where the ostensible duty of care can be ascertained or even inferred.

[26] Under the circumstances, having regard to all of the foregoing, this Court finds that the exceptions of both the First Defendant and the Second Defendant should be upheld.

## **Costs**

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<sup>16</sup> *Emphasis added*



[27] It is trite that costs fall within the general discretion of the Court. Further, it is trite that costs normally follow the result unless unusual circumstances exist. No such circumstances have been brought to the attention of this Court. In the premises, the Plaintiff should pay the costs of this application.

### **Order**

[28] This Court makes the following order:

1. The First Defendant's and Second Defendant's exceptions to the Plaintiff's Particulars of Claim are upheld.
2. The Plaintiff is given leave to amend the Plaintiff's Particulars of Claim within Thirty (30) days of the date of this order.
3. The Plaintiff is to pay the costs of the First Defendant and the Second Defendant in this application.

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**B. C WANLESS  
ACTING JUDGE OF THE HIGH COURT  
GAUTENG LOCAL DIVISION  
JOHANNESBURG**

Date of hearing: 28 August 2023  
Date of judgment: 22 November 2023

**Appearances**

On behalf of the Plaintiff: Adv. Adv. K. Mubu  
Adv. T. M. Malcola  
Adv. I. Naidoo

Instructed by: Nchupetsang Inc.  
%Ntchupetsang Inc. Attorneys

On behalf of the 1<sup>st</sup> Defendant:  
Instructed by: Adv. H. Cassim  
Norton Rose Fulbright South Africa Inc

On behalf of 2<sup>nd</sup> Defendant:  
Instructed by: Adv. W. J. Bezuidenhout  
Van der Lith Inc.