

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 38973/2015

- (1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No
(3) REVISED: Yes / No

Date: 26 July 2023

WJ du

In the matter between:

SUNNYBOY WILSON RADEBE

FIRST APPLICANT

TRYPHINA NOMHLEKHAYA NTULI

SECOND APPLICANT

TRYPHINA NOMHLEKHAYA NTULI

THIRD APPLICANT

(IN HER REPRESENTATIVE CAPACITY IN RESPECT OF THE MINOR
CHILD SIMPHIWE RADEBE)

TRYPHINA NOMHLEKHAYA NTULI

FOURTH APPLICANT

(IN HER REPRESENTATIVE CAPACITY IN RESPECT OF THE MINOR
CHILD SIYABONGA RADEBE)

and

SBV SERVICE (PTY) LTD

FIRST RESPONDENT

SIPHO SIBISI

SECOND RESPONDENT

In re:

SUNNYBOY WILSON RADEBE

FIRST PLAINTIFF

TRYPHINA NOMHLEKHAYA NTULI

SECOND PLAINTIFF

TRYPHINA NOMHLEKHAYA NTULI

THIRD PLAINTIFF

**(IN HER REPRESENTATIVE CAPACITY IN RESPECT OF THE MINOR
CHILD SIMPHIWE RADEBE)**

TRYPHINA NOMHLEKHAYA NTULI

FOURTH PLAINTIFF

**(IN HER REPRESENTATIVE CAPACITY IN RESPECT OF THE MINOR
CHILD SIYABONGA RADEBE)**

and

SBV SERVICE (PTY) LTD

FIRST DEFENDANT

SIPHO SIBISI

SECOND DEFENDANT

JUDGMENT

DU PLESSIS AJ

[1] Background

[1] This is an application in terms of Rule 28(3). Summons was issued on 5 November 2015. The Applicants are the Plaintiffs in the main action and the Respondents in this application are the Defendants in the main action. I will refer to the parties as they are in the main action.

[2] The Plaintiffs claim in their initial Particulars of Claim that the Second Defendant, on or about 7 December 2013, assaulted the First Plaintiff at a filling station, with

the back of a rifle firearm on the forehead, in full view of the Second Plaintiff and two minor children. They claim various damages. For the First Plaintiff, future medical expenses, past loss of earnings, future loss of earnings and general damages; for the Second to Fourth Plaintiffs, future medical expenses and general damages. They claim vicarious liability of the First Defendant as the employer of the Second Defendant. On 31 March 2016, the Respondents delivered a Notice of Intention to defend, and on 30 June 2016, they filed a Notice of Exception.

[3] On 13 January 2017, the Applicants delivered their a second Rule 28(1) notice¹ of intention to amend their the particulars of claim. On 26 January 2017, the Respondents delivered their a second Rule 28(3) notice² of **objection** to the proposed amendment. This led culminated into the application now before this court. to this application before this court.

[4] Apart from clarifying the occupation and other details of the Plaintiffs, it added additional information to the incident, namely a dispute at the ATM at the garage, an assault with the rifle and an altercation with the Second Plaintiff where Second Defendant threatened to shoot her.³ They added a claim of assault to the claim.

[5] There are eight grounds of objection. They are:

- i. That a claim for the Second Plaintiff (pointing of a firearm and assault of the First Plaintiff) is now introduced after the three-year prescription period. This claim has thus prescribed.
- ii. The Second to Fourth Plaintiff's attempts to introduce a claim (linked to i above) which has not appeared in the Particulars of Claim before and has thus prescribed. It would also be vague and embarrassing as they claim assault but plead intimidation.
- iii. The proposed amendment claims R25 000 for consultations with various doctors, without providing calculation or computation for the amounts, rendering it excipiable.
- iv. The proposed Particulars of Claim does not disclose a cause of action against the First Defendant.

¹ On 18 August 2016 the Applicants delivered their first Rule 28(1) notice of intention to amend their particulars of claim.

² On 6 September 2016 the Respondents delivered their first Rule 28(3) notice of exception to the proposed amendment, and on 26 October 2016 a notice of exception.

³ CaseLines 001-45.

- v. The proposed Particulars of Claim, in the claim for damages for the Second Plaintiff claims for alleged insult, ends the sentence with "etc". It is unclear what is meant with his, or how and with whom her reputation in the community will be or was diminished, rendering it excipiable.
- vi. Like (v) above, the claim relating to the children's humiliation and embarrassment also ends with "etc", rendering it excipiable.
- vii. The Second Plaintiff introduced claims based on the threat and/or assault of the Second Plaintiff that was previously not pleaded and that thus attempted to enter claims on a new cause of action on behalf of the two minor children, again introducing a new cause of action post prescription;
- viii. The First and Second Plaintiffs claim for pain and suffering, ending the sentence again with "etc", rendering it excipiable.

[6] The Plaintiffs respond to these grounds as follows:

- i. Prescription is a defence that raises a question of law, and the appropriate action is for the Defendant to file a special plea and invoke Rule 33. It is then, in line with *Mtokonya v Minister of Police*,⁴ a question of law that the court must decide.
- ii. The second cause of objection should be dismissed on the same grounds as (i).
- iii. The Plaintiffs submit that the amounts claimed are globular figures, as they cannot at this stage ascertain the exact amount for future medical expenses. The Defendants should rather deny the claim and put the Plaintiffs to proof thereof.
- iv. The Plaintiffs specifically plead that the second defendant was in the employment of the First Defendant, and that he was acting in his capacity as an employee for the First Defendant. The rest is a matter of evidence.
- v. This objection is very technical in nature, and that the amendments can be pleaded to sufficiently as it stands.
- vi. Similar to the fifth ground.
- vii. Similar to the first ground.
- viii. Similar to the fifth and sixth grounds.

[2] Issues for determination before the court

[7] It is for this court to determine the following issues as per practice note:

- i. Whether the Plaintiffs are entitled to the amendment;

⁴ [2017] ZACC 33 par 14.

- ii. Whether the Defendants will suffer any prejudice or injustice if the Plaintiffs were to be granted leave to amend their particulars of claim as proposed;
- iii. Whether the proposed amendment will introduce a new cause of action, which new cause of action has prescribed;
- iv. Whether the particulars of claim will become or remain excipiable;
- v. Whether the Applicants are seeking an indulgence;
- vi. Costs.

[8] To answer these questions, a discussion of the relevant legal principles and consideration of the principles of pleadings are required.

[3] The law

[9] In *South African Police Service v Solidarity obo Barnard*⁵ explained the link between the purpose of pleadings and the right to a fair hearing as guaranteed in s 34 of the Constitution. It stated

It is a principle of our law that a party must plead its cause of action in the court of first instance so as to warn other parties of the case they have to meet and the relief sought against them. This is a fundamental principle of fairness in the conduct of litigation. It promotes the parties' rights to a fair hearing which is guaranteed by section 34 of the Constitution.

[10] How do pleadings comply with these requirements do this? By defining the issues for the other party, the trial court, and any court of appeal. The courts adjudicate only those disputes contained in the pleadings.⁶ Rule 18 (also discussed below) states that the pleadings must contain clear and concise statements of the material facts upon which the pleader relies (be it the claim, or the defence of the answer). It must be particular enough to enable the opposite party to rely thereto.⁷ The facts

⁵ (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC)

⁶ *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC), 2007 (5) SA 323 (CC) para. 39

⁷ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (3) BCLR 219 (CC), 2012 (1) SA 256 (CC) para. 52

(*facta probanda*) are pleaded, not the evidence (*facta probantia*).⁸ These facts are important for a conclusion, opinion or inference: these must be supported by the primary facts.⁹ It is not the legal conclusion that determines the real issues between the parties but the facts alleged.¹⁰ This is why parties are held to their case pleaded.

[11] Rule 18 sets out what must be contained in the pleadings. It must set out the facts on which a party relies for their claim (or defence, or answer). Rule 18(10) deals specifically with the issue of damages. It states that:

“A plaintiff suing for damages shall set them out in such a manner as will enable the Defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for

(a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of

(i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

(ii) the enjoyment of amenities of life (giving particulars); and stating whether the disability concerned is temporary or permanent; and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.”

[12] A plaintiff suing for damages must thus set the damages out in such a manner to enable the defendant to assess their quantum.¹¹ The aim is to provide the defendant with reasonably sufficient information to enable them to assess the quantum and to make a reasonable tender of payment into court, which upon

⁸ *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* [2001] 2 All SA 319 (T), 2001 (2) SA 790 (T).

⁹ *Dros (Pty) Ltd v Telefon Beverages CC* [2003] 1 All SA 164 (C), 2003 (4) SA 207 (C) para. 28

¹⁰ *F v Minister of Safety and Security and others (Institute for Security Studies and others as amici curiae)* 2012 (3) BCLR 244 (CC), 2012 (1) SA 536 (CC), (2012) 33 ILJ 93 (CC), 2013 (2) SACR 20 (CC) para. 128.

¹¹ *Custom Credit Corp (Pty) Ltd v Shembe* 1972 (3) SA 462 (A).

acceptance, will bring litigation to an end.¹² The information must enable them to make a realistic assessment of what should be tendered.¹³ The information should enable the defendant to make their own assessment, as they are not intended to be a passive party that checks what the plaintiff says.¹⁴ When it comes to the preparation for trial, the defendant can always ask for further particulars of claim in terms of Rule 21(4) and (5) too.

[13] It is possible to except to certain averments in pleadings. The purpose of raising an exception to the pleading is to dispose of the leading of evidence at that point in the trial. There are two grounds for exceptions in terms of Rule 23. One, that the pleading is vague and embarrassing,¹⁵ or two, that the pleading lacks the averments necessary to sustain a cause of action (thus bad in law).¹⁶ For it to constitute sufficient grounds for an exception, the vagueness of the pleadings must result in prejudice or "embarrassment" to the opposing side if it is allowed to persist.¹⁷

[14] It is also possible for parties to amend their pleadings. Rule 28(1) sets out the procedure that must be followed. It states that

Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

[15] Rule 28(3) requires that

An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

[16] If the Applicant wants to pursue the amendment, they must apply to the court on notice in terms of Rule 6(11), the reason for this application.

¹² *Cape Diving and Salvage (Pty) Ltd v Viljoen* 1979 (1) SA 871 (C).

¹³ *Cete v Standard and General Insurance Co Ltd* 1973 (4) SA 349 (W).

¹⁴ *Cete v Standard and General Insurance Co Ltd* 1973 (4) SA 349 (W).

¹⁵ *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* [2001] 2 All SA 319 (T), 2001 (2) SA 790 (T).

¹⁶ *Trope v SA Reserve Bank* [1993] 2 All SA 278 (A), 1993 (3) SA 264 (A).

¹⁷ *Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at para 54–56

[17] In terms of Rule 28(6) the court may make an appropriate order.¹⁸ It may grant the amendment in a form different from what was applied for.¹⁹

[18] It is well known that the pleadings must contain the facts that must be proved by the plaintiff (*facta probanda*) to make out a valid cause of action.²⁰ In *Du Toit NO v Steinhoff International Holdings (Pty) Limited* the court stated that

“all that really is required of a plaintiff in so far as the particulars of claim is concerned, is that the defendant must have a clear enough exposition of the plaintiff’s case to enable the defendant to take instructions from a client (and witnesses where necessary) to file an adequate response to the claim in the form of a plea.”

[19] With this in mind, I now turn to an assessment of the specific objections raised by the Defendants.

[4] **Considering the grounds**

(i) **Grounds (i) and (ii): Introducing a new cause of action that has prescribed**

[20] *Cordier v Cordier*²¹ dealt with a matter where aspects of the plaintiff’s claim as amended would have prescribed. The court stated that this will not be allowed, although it was unusual for the issue of prescription to be raised by special plea and not by way of an objection to an amendment.

[21] *Stroud v Steel Engineering Co Ltd*²² dealt with the argument that proposed amendment to the pleadings will cause the substitution of the cause of action which, the court states will lead the defendant to be faced with a cause of action that has prescribed. The court stated²³

There remains the contention that because the claim is prescribed, it should not be allowed. I accept that the Court normally would not permit an allegation which has no

¹⁸ *Fiat SA (Pty) Ltd v Bill Troskie Motors* 1985 (1) SA 355 (O).

¹⁹ *Levy v Levy* 1991 (3) SA 614 (A); *National Media Ltd v Bogoshi* [1998] 4 All SA 347 (A), 1998 (4) SA 1196 (SCA).

²⁰ *Du Toit NO v Steinhoff International Holdings (Pty) Limited* [2021] ZAWCHC 222.

²¹ 1984 (4) SA 524 (C).

²² 1996 (4) SA 1139 (W).

²³ At 1142.

possibility of advancing the situation of a litigant and can at best serve as a basis for the need to hear evidence which leads nowhere. Accordingly it would make no sense to permit a claim which is known to have prescribed. But if the supervening of prescription is not common cause, the application for amendment is normally not the proper place to attempt to have that issue decided. Technically speaking, in fact, prescription is not an issue until it has been pleaded. I say "normally" because there may be special cases, for example where only legal interpretation makes the difference to facts which are common cause.

[22] This was quoted and followed in *Grindrod (Pty) Ltd v Seaman*,²⁴ where the court held that it would serve no purpose allowing an amendment only to have it dismissed after the success of a special plea.

[23] The question, however, is whether the claim has prescribed. The first particulars of claim set out the Second Plaintiff's claim as one of emotional shock for witnessing the assault on the First Plaintiff on 7 December 2013. The proposed amended dated 6 January 2017 sets out the claim as the Second Defendant assaulting the Second Plaintiff by pointing a firearm at her. The Respondents argue that this is a new cause of action. The Plaintiff argues that the amended particulars of claim rests on the same facts (*facta probanda*) as the original particulars of claim, and whether this will succeed is for the trial court hearing the evidence to decide.

[24] Whichever way, there is a dispute whether a new cause of action will be introduced, and whether the claim has prescribed. It is not for this court to decide. If I allow the amendment, then it is up to the Defendant to raise the special plea of prescription. I will therefore allow the amendment.

(ii) The R25 000 amount

[25] The Applicants submit that they are unable to ascertain the exact amount for future medical expenses or any other heads of damages. They propose that the Applicants are entitled to deny the allegation in their plea and put the Applicants to proof thereof.

[26] There is sufficient information for the Respondent to plea to, and thus compliance with Rule 18. It is still for the Plaintiff to bring sufficient evidence to the trial to show how this amount was made up.

²⁴ 1998 (2) SA 347 (C).

(iii) The proposed Particulars of Claim do not disclose a cause of action against the First Defendant

[27] The Applicants contend that the objection is premature. The proposed amendment reads:

27.1 At all times relevant hereto when the Second Defendants wrongfully, unlawfully and intentionally, alternatively negligently, hit the person of the First Plaintiff as aforementioned – and also wrongfully unlawfully and intentionally assaulted the person of the Second Plaintiff also as aforesaid – the Second Defendant

27.1.1 was in the employ of the First Defendant as a security officer or guard in a capacity or rank to the First Plaintiff unknown.

27.1.2 was acting as such in his capacity as an employee of the First Defendant.

27.1.3 was acting within the course and scope of his employment as a security officer or guard in the employ of the First Defendant.

[28] This is also sufficiently set out to enable the First Defendant to plead to it. It will be for the Plaintiff to provide facts to the court to convince the court that the Second Defendant did act in his scope of employment. Alternatively, there are processes such as asking for further details available to the Defendants.

(iv) The "etc" at the end of paragraphs renders it excipiable

[29] The Applicants submit that the objection is of a technical nature. I agree. Case law states that technical objections to less than perfect procedural steps should not be permitted unless prejudice can be shown.²⁵ The amendment sought will be accordingly be granted, excluding etc.

[5] Conclusion

[30] Counsel for the Respondent argued that if the court found that one ground is objectionable, then the whole amendment must be rejected. None of the grounds of objection has any merit. My view is that the Applicants are entitled to costs of the application, but that the order should read as set out below.

[6] Order

[31] I, therefore, make the following order:

²⁵ *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 2730

1. The Applicants are granted leave to amend the Plaintiffs' Particulars of Claim in accordance with the notices of amendment, save for the abbreviation 'etc' wherever it appears.
2. The Plaintiffs shall deliver the amended particulars of claim, pursuant to paragraph 1 above, within 10 days of the date of this order.
3. The respondents shall pay the costs of this application, such costs to be taxed after the finalisation of the trial

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the Applicant:	Mr TM Malatji
Instructed by:	Nkosi Nkosana Incorporated
Counsel the for respondent:	Mr AJ Venter
Instructed by:	Whalley & Van der Lith Inc
Date of the hearing:	18 July 2023
Date of judgment:	26 July 2023

