

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 22095/2022

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

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SIGNATURE

DATE 7 August 2023

In the matter between:

KAMOHELO SESHABELA

Plaintiff

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

Defendant

JUDGMENT

MAHON AJ:

- [1] The plaintiff instituted action against the defendant for damages in an amount of R1 300 000 arising from an injury sustained by the plaintiff when he stepped on an open municipal manhole, stumbled and fell.
- [2] The pertinent allegations advanced by the plaintiff are that:
- [2.1] The defendant is a municipality established in terms of section 12 of the Local Government Structures Act 117 of 1998;
- [2.2] At all material times, the defendant was responsible for the development, maintenance and upgrades of all roads, sewerage draining systems and general development of the area within its jurisdiction in Gauteng and more particularly in and around Soweto;
- [2.3] On or about 11 November 2021 and at or near Kama Road and Mosiane Street, Soweto, the plaintiff was walking and stepped on an open municipal manhole, stumbled and fell, resulting in certain pleaded injuries;
- [2.4] The defendant caused the construction of the manhole and accordingly "... *had legal way to keep it closed at all times*";
- [2.5] The aforesaid incident was caused by the sole negligence of the defendant who was negligent in the following ways:
- [2.5.1] It failed to maintain the manhole appropriately or at all;
- [2.5.2] It failed to put a notice of a sign to notify road users of the existence of the open manhole; and

[2.5.3] It failed to keep the street and its pavement in a safe condition as per its constitutional mandate and duty.

[3] The defendant raises two exceptions to the plaintiff's particulars of claim. In its first complaint, the defendant asserts that the plaintiff has failed to plead "*on what basis in law the Defendant is liable for the plaintiff's alleged claim*". Properly understood, the defendant's complaint is directed at the question of wrongfulness. In particular, the defendant complains that the source of the alleged duties relied upon by the plaintiff are not pleaded.

[4] In the result, the defendant contends that the plaintiff's particulars of claim lack averments necessary to sustain a cause of action.

[5] In its second complaint, the defendant contends that the particulars of claim are vague and embarrassing because the plaintiff does not plead the time of day at which the alleged incident took place.

[6] I intend to deal with each complaint separately.

THE FIRST COMPLAINT

[7] The plaintiff's claim is based on the *actio legis Aquiliae*, which entitles a plaintiff to recover patrimonial loss suffered through a wrongful and negligent act of the defendant. As mentioned above, the defendant's first complaint is directed at the element of wrongfulness.

[8] Wrongfulness can manifest itself in different ways as, for example, a breach of a common law right, a particular statutory duty or a duty of care.

- [9] In the latter case, where a specific breach of a duty such as a banker's duty to the plaintiff who is not a client or a public authority's duty is relied on, the nature of the duty must be stated¹.
- [10] What this entails, is not only that the duty relied upon be pleaded, but that the source from which it is derived be clearly set out. A mere allegation that the defendant was under a duty of care is insufficient because the existence of a duty to prevent loss is a conclusion of law depending on all the circumstances of the case.
- [11] The general nature of the enquiry is stated in the well-known passage attributed to Fleming, *The Law of Torts*, 4th edition at page 136, quoted in **Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) at 833-834A** concluding with the following:

"In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes."

- [12] It was on the basis of this reasoning that Botha JA, in **Knop v Johannesburg City Council**², held that the mere allegation in the particulars of claim that the council was under a duty to take steps to prevent loss being caused to the plaintiff would be insufficient to "*carry the day for him*".

¹ **SAR&H v Marais 1950 (4) SA 610 (A); Hawker v Prudential Assurance Co of SA Ltd 1987 (4) SA 442 (C) at 450.**

² **1995 (2) SA 1 (A) at 27F**

- [13] On a benevolent interpretation of the particulars of claim, the plaintiff has, indeed, pleaded a duty, referred to as a “*responsibility*” to develop, maintain and upgrade roads and sewerage drainage systems. By pleading that the plaintiff failed to maintain the manhole appropriately or at all, to put a notice or sign up to notify road users of the existence of the open manhole or to keep the street and its pavement in a safe condition suggests to the reader (again, on a benevolent interpretation) that the duty to carry out those activities exist.
- [14] However, as stated in **Knop**, the mere allegation that the defendant was under a duty of care is insufficient.
- [15] It is not clear what facts and circumstances are alleged to give rise to the duty relied upon or whether the duty is a statutory one. In this regard, the plaintiff does plead that the defendant failed to keep the street and its pavement in a safe condition “... *as per its constitutional mandate and duty*”. However, it is not clear upon which provision in the Constitution reliance is placed.
- [16] In order for the defendant to plead meaningfully, it must be alerted to any statutory or constitutional provision which is relied upon by the plaintiff and if a common law duty of care is relied upon then the specific facts and circumstances which give rise to the duty must be set out. These facts have not been pleaded by the plaintiff. The mere fact that the defendant is a municipality does not inform the reader of the source of the duty relied upon which may or may not be a constitutional or statutory duty which is placed on all municipalities.

[17] Moreover, the mere fact that the defendant caused the construction of the manhole is not sufficient, in my view, to give rise to the duty of care contended for, as a matter of law.

[18] In the premises, the first complaint should be upheld.

THE SECOND COMPLAINT

[19] A complaint that a pleading is vague and embarrassing is intended to cover the case where, although a cause of action appears, there is some defect or incompleteness in the manner in which it set out, which results in embarrassment to the defendant³.

[20] An exception that a pleading is vague or embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged⁴.

[21] The effect of this is that the exception can be taken only if the vagueness relates to the cause of action⁵.

[22] In the present case the defendant complains of a lack of particularity. The detail which is said to be missing is the time of day during which the incident occurred. The following principles applicable to complaints of vagueness and embarrassment arising from a lack of particularity are apposite in the present case:

³ **Liquidators Wapejo Shipping Co Ltd v Lurie Bros 1924 AD 69 at 74.**

⁴ **Levitan v New Haven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298A.**

⁵ **Liquidators Wapejo *supra* at 74.**

[22.1] In each case the Court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. If a statement is vague, it is either meaningless or capable of more than one meaning⁶. To put it at its simplest, the reader must be unable to distil from the statement a clear single meaning⁷.

[22.2] If there is vagueness in this sense the Court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of⁸.

[22.3] In each case an *ad hoc* ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail⁹.

[22.4] The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced¹⁰.

⁶ **Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) at 644A-B.**

⁷ **Venter *supra* at 644B.**

⁸ **Quinlan v MacGregor 1960 (4) SA 383 (D) at 393E-H.**

⁹ **See Erasmus *Commentary on Rule 23* at RS20, 2022, D1-304.**

¹⁰ **Quinlan *supra* at 393G.**

[23] I am not satisfied that the defendant is prejudiced in its ability to plead by virtue of not having been informed of the time of day of the incident. It is not clear what value is to be gained from this detail. If it is to determine the extent to which the manhole may have been visible, then the absence of this detail does not amount to prejudice as:

[23.1] the visibility of the manhole is not necessarily dependent upon the time of day and may turn on other factors such as artificial lighting and the like;

[23.2] the lack of visibility of the manhole is not an element of the plaintiff's cause of action albeit that it may serve some evidentiary purpose.

[24] In my view, the lack of detail complained of does not cause any meaningful prejudice to the defendant and does not prevent the defendant from being able to plead. The particularity sought may be obtained by way of a request for particulars for purposes of preparing for the hearing in due course.

COSTS

[25] Two complaints were raised against the plaintiff's particulars of claim. One has been upheld and one is dismissed. In that respect, each of the parties has obtained a measure of success. I am therefore of the view that the appropriate costs order should be that each party should bear their own costs of the exception.

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

1. The defendant's first complaint in its exception is upheld;

2. The defendant's second complaint in its exception is dismissed;
3. The plaintiff's particulars of claim in their present form are struck out;
4. The plaintiff is afforded a period of 15 (fifteen) days within which to amend its particulars of claim in the light of the first complaint raised by the defendant in its exception;
5. Each party is to bear their own costs of the exception.

D MAHON

Acting Judge of the High Court

Johannesburg

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 7 August 2023.

APPEARANCES:

For the plaintiff: Advocate M A Bester

Instructed by: Rick Martin Inc

For the defendant: Adv L Matsiela

Instructed by: Yonela Bodlani Attorneys

Date of hearing: 3 August 2023

Date of judgment: 7 August 2023