



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. **29108/2022**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: 20/8/2023


SIGNATURE

21 August 2023
DATE

In the matter between:

NAVIGARE SECURITIES (PTY) LIMITED

First Plaintiff/Respondent

PAMELLA MONGOATO RADEBE N.O.

Second Plaintiff/Respondent

and

**VICKERS AND PETERS FINANCIAL
PLANNING (PTY) LIMITED**

First Defendant

DISCOVERY LIFE LIMITED

Second Defendant/Excipient

Delivered :This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploaded on caselines electronic platform. The date for hand-down is deemed to be 21 August 2023.

JUDGMENT

YENDE AJ

NATURE OF THE PROCEEDINGS

[1] Before Court is an exception in which the second defendant/excipient raises 4 (four) grounds for excepting to the first and second plaintiffs'/respondents' particulars of claim as being vague and embarrassing and/or lacking the necessary averments to sustain a cause of action.

[2] In the action, the first and second plaintiffs'/respondent's claim payment of a life cover benefit and an income continuation benefit in terms of a Group Life Scheme Insurance Policy (the "Policy") which benefits were partially paid by Discovery.

[3] The Policy was effected by the first plaintiff/Respondent ("Navigare") for the benefit of all its existing and future employees. The claim pertains to one Mr Radebe, who, upon being employed by Navigare as its CEO, was added as a member of the Policy in April 2016.

[4] After Mr Radebe became ill in December 2016, he claimed the income continuation benefit under the Policy which was partially paid by Discovery. After Mr Radebe died in January 2021, his deceased estate claimed payment of a life cover benefit under the Policy which was partially paid by Discovery.

[5] Second defendant/excipient rejected the claim for the full life cover benefit, alleging that Mr Radebe had failed to provide medical evidence showing that he was in good health. The plaintiffs contend that Discovery should have requested such medical evidence within a reasonable time after Mr Radebe was added as a member of the policy.

[6] The issues to be adjudicated by this Court are as follows;

[6.1] In respect of the first ground of exception: whether the executrix of a deceased estate has *locus standi* to sue on a policy concluded between the employer and the insurer;

[6.2] In respect of the second ground of exception: whether the first and second plaintiffs'/respondents claim is for contractual damages or a claim for specific performance (a claim for payment of insurance benefits). If it is a claim for contractual damages, whether the plaintiffs have alleged facts which establish a causal nexus between the breach and the damages allegedly suffered;

[6.3] In respect of the third ground of exception: whether the plaintiff has pleaded fulfilment of the conditions precedent as set out in the Policy;

[6.4] In respect of the fourth ground of exception: whether the plaintiffs' claim seeks to simultaneously assert two mutually destructive positions by claiming damages and by claiming specific performance.

EPHEMERAL FACTUAL MATRIX

The First and Second Plaintiff's/Respondent's Pleaded facts .

For purposes of this judgment only the most relevant pleaded facts are restated.

[7] For purposes of adjudicating this exception only, the facts pleaded by the first and second plaintiffs/respondents must be assumed to be correct.¹ Unfortunately the particulars of claim are not a model of clarity.

[8] The first plaintiff/respondent is NAVIGARE SECURITIES (PTY) LIMITED, a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa whose registered address, alternatively, main place of business is at [...] Houghton Estate, Johannesburg, 2041².

¹ Pretorius and Another v Transport Pension Fund and Another 2019 (2) SA 37 (CC) para 15.

² Caselines paginated pgs. 002-5

[8.1] The second plaintiff/respondent in PAMELLA MONGOATO RADEBE N.O, a major executrix in the estate of the late Mr Vuyisile O Radebe ("the deceased"), who institutes this action in her capacity as such. The second plaintiff was duly appointed as the executrix by the Master of the High Court in terms of Letters of Executorship issued on 22 April 2021³.

[8.2] At all times material hereto:

[8.2.1] The deceased was the Chief Executive Officer of the First Plaintiff;

[8.2.2] All of the first plaintiff's employees participated in its Group Insurance Cover underwritten by the Second Defendant.

[8.2.3] The deceased, accordingly, participated thereunder.

[9] The second defendant/excipient is DISCOVERY LIFE LIMITED, a licenced insurer as contemplated in the Insurance Act No 18 of 2017("the Insurance Act"), with insurer registration number [...] and whose registered address, alternatively ,main place of business is [...]Discovery Place, Sandton, Gauteng Province,2146.

[10] During or about November 2012, the first plaintiff/respondent accepted the second defendant's/excipient's quotation acceptance form, pursuant to which a contract of group insurance ensued between the first plaintiff and the second defendant on the terms included in the second defendant's quotation acceptance form and application (**annexure "C"**), subject to the second defendant's statutory obligations⁴.

[11] The deceased was included in the group insurance scheme without being requested to undergo an examination⁵.

[12] Consequently, the second defendant/excipient undertook to insure the deceased for full cover under the Insurance Agreement or (**" the Group Scheme"**)⁶.

³ Caselines paginated pgs. 002-5

⁴ Caselines paginated pgs.002-10

⁵ Particulars of claim para 16

⁶ Particulars of claim para 17

[13] It was a further material express, alternatively, implied, further alternatively, tacit term of the Insurance Agreement that the second defendant would (*inter alia*);

[13.1] Provide Full Cover to the deceased;

[13.2] Comply with all the applicable laws including the Insurance Act, the long-Term Insurance Act, the FAIS, the Codes of Conduct and the PPR's made thereunder;

[13.3] Grant cover in excess of the FCL once the required medical evidence has been submitted to the satisfaction of the second defendant⁷.

[14] The second defendant breached the terms of the Insurance Agreement in the following respects:

[14.1] It failed to provide Full Cover to the deceased⁸;

[14.2] It failed to comply with the provisions of the applicable laws including the Insurance Act, the Long-Term Insurance Act, the FAIS, the Code of Conduct and the PPR's made thereunder; and⁹

[15] As direct consequence of the second defendant's breach aforesaid, the first and second plaintiffs have suffered damages, representing the difference between the amount of the full cover and the amount paid by the second defendant¹⁰.

[15.1] Consequently, the second plaintiff claims the amount of R 14 171 390,90 from the second defendant which amount is made up as follows¹¹:

[15.2] R 1 284 890.86 being the difference between the amounts due of R 125 000.00 per month from November 2019 until January 2021, with January 2021 being pro

⁷ Particulars of claim para 18.12

⁸ Particulars of claim para 19.1

⁹ Particulars of claim para 19.2

¹⁰ Particulars of claim para 20

¹¹ Particulars of claim para 23

rata; and the amounts actually paid R 35 000.00 from November 2019 until October 2019 coupled with amounts of R 36 050.00 being part from November 2019 until January 2021, with January 2021 being pro rata¹²;

[15.3] R 12 886 500.00 being the difference between the amounts due to the deceased under the Discovery Life Policy of R 16 516 500.00 (R 3 303 300.00 salary multiplied 5) and the amount actually paid out to the Late Estate of the deceased of R 3 630 000.00.¹³

[16] On or about 5 December 2019, the second defendant repudiated ,alternatively partially repudiated the second plaintiff's income continuation benefit claim on account of the deceased's alleged failure to provide medical evidence of good health in order to qualify for Full Cover¹⁴.

[17] On or about 25 May 2021, the second defendant repudiated ,alternatively partially repudiated the second plaintiff's income benefit claim on account of the deceased's alleged failure to provide medical evidence of good health in order to qualify for Full Cover¹⁵.

[18] The deceased was in good health at the time of entering into the Insurance Agreement and within the period of 90 days thereafter¹⁶.

[19] But for the first and/or second defendant's breaches aforesaid the deceased¹⁷;

[19.1] Would have provided medical evidence of good health within the aforesaid period of 90 days after the conclusion of the Insurance Agreement;

[19.2] Would have received the Full Cover.

[20] The first and second plaintiff/ respondent aver that the second defendant/excipient had failed to exercise its discretion to request Mr Radebe to provide medical

¹² Particulars of claim para 23.1

¹³ Particulars of claim para 23.2

¹⁴ Particulars of claim para 24

¹⁵ Particulars of claim pars 25

¹⁶ Caselines paginated pgs. 002-15

¹⁷ Particulars of claim para 26.1

evidence of his good health within a reasonable time after adding Mr Radebe to the policy as a new employee/member. It the first and second plaintiff's/respondent's contention that the second defendant/excipient had breached its own obligations in terms of the Policy by partially rejecting the claims for payment of the income continuation benefit and the life cover benefit.

[21] The second plaintiff and the deceased during his lifetime suffered the above damages as a direct consequence of the first and second defendant's breaches aforesaid, which damages represent the difference between the amount of the Full Cover and the amount paid by second defendant to the second plaintiff and the deceased during his lifetime¹⁸.

[22] The second plaintiff contends that it is entitled to payment from the first and second defendant, jointly and severally, the one paying and the other to be absolved, an amount of R 14 171 390.90 plus interest thereon a *tempore morae* from date of judgment to date of payment.¹⁹

The Second Defendant's / Excipient's Grounds of Exception.

First Exception.

[23] The Second Defendant/ Excipient raised four grounds of exception²⁰. These grounds relate both to the vague and embarrassing nature of the particulars of claim, and to their failure to disclose a cause of action.

[24] The second defendant/ excipient contends that the second plaintiff in claiming payment of the amount of R 14 171 390.90, it is unclear whether it seeks specific performance of the contract of insurance or whether the claim is a claim for damages due to the second defendant's alleged breach of contract²¹.

¹⁸ Particulars of claim para 27

¹⁹ Particulars of claim para 28.

²⁰ See caselines paginated pgs. 005-4

²¹ Particulars of claim para 28.

[25] Regardless of whether the claim is one for damages or specific performance, the second plaintiff (or the deceased) must have been a party to the contract of insurance sued upon.

[26] A person who is not a party to a contract may not sue upon it. This is known as the doctrine of privity of contract.²²

[27] In the absence of privity of contract between a plaintiff and the defendant, the plaintiff will lack locus standi to bring the application.²³

[28] A provision in a contract of insurance which provides that the benefits will be payable to a third party (such as a spouse, dependent or employee) of the insured is a stipulation for the benefit of a third party (*stipulation alteri*)²⁴.

[29] Rights only vest in a third party to a contract (with the result that the third party acquires locus standi to sue under the contract) upon the third party's ratification and acceptance of the benefit.²⁵ Until such acceptance there is no *vinculum juris* between the third party and the promisor (in this case the second defendant).²⁶

[30] The second defendant/ excipient contends that the plaintiffs do not plead that the second plaintiff has accepted the benefit under the contract of insurance²⁷.

[30.1] To the contrary, it is clear from the fact that the promisee (the first plaintiff sues) that the second plaintiff has not accepted the benefit²⁸.

²² Wessels ' Law of Contract in South Africa 2nd ed pars 4610: Christie's Law of Contract in South Africa (7th ed) at p. 302: and see Cosira Developments (Pty) Ltd v Sam Lubbe Investments C C 2011 (6) SA 331 (GSJ) at para 14.

²³ Cosira Developments (Pty) Ltd v Sam Lubbe Investments C C supra at para 14.

²⁴ Pieterse v Shrosbree NO & others; Shrosbee NO v Love & others 2005 (1) SA 309 (SCA) at para 8; Mutual Life Insurance Co of New York v Holtz 1911 AD 556; Reinecke, General Principles of Insurance Law at par 406.

²⁵ Hyams v Wolf and Simpson 1908 TS 78 at pgs 82 (quoting Tradesmen's Benefit Society v Du Preez (1887) 5 SC 269);

²⁶ Bagradi v Cavendish Transport Co (Pty) Ltd 1957 (1) SA 663 9(D) at 668A.

²⁷ Caselines paginated pgs 005-11

²⁸ Where there has been acceptance of the benefit by the third party, the promisee " drops out of the contract". See Schriener JA said in Crookes NO & another v Watson & other 1956 (1) SA (A) quoted with approval in Eldacc (Pty) Ltd v Bidvest Properties (Pty) Ltd 2011 JDR 1178 (SCA) at pars 8.

[31] Even if the second plaintiff had accepted the benefit, this would not give her *locus standi* to sue in respect of the alleged breaches pleaded in paragraph 19 (and subparagraphs) of the particulars of claim. A third party is limited to acceptance of the benefit under the contract (assuming the benefit arises) and cannot sue for alleged historical breaches (occurring prior to acceptance and prior to the third party becoming a party to the contract) which result in the benefit not coming into existence²⁹.

[31.1] Consequently, contend the second defendant/ excipient that the particulars of claim do not disclose a valid cause of action.

[32] The first and second plaintiff aver that this ground of exception lacks merit for the following reasons:

[32.1] The second plaintiff is cited and claiming in her capacity as the executrix of the deceased estate of the late Mr Radebe ,her husband.

[32.2] Mrs Radebe, in her official capacity as aforesaid, claims the proceeds of the Policy, specifically, the full life cover benefit and income continuation benefit, as the deceased was an employee and a member of the Policy, entitling him to these benefits.

[32.3] Whether or not the Policy is a *stipulatio alteri* depends on the wording of the policy and the intention of the parties³⁰. The SCA held, per Smalberger JA, that: "the mere conferring of a benefit is therefore not enough; what is required is an intention on the part of the parties to a contract that a third person can, by adopting the benefit, become a party to the contract³¹."

[32.4] Therefore, objectively construed, the parties did not intend that Navigare's employees would become parties to the insurance contract concluded between Navigare and Discovery and the full cover in terms of the income continuation

²⁹ Caselines paginated pgs 005-12.

³⁰ Total South Africa (Pty) Ltd v Bekker NO 1992 (1) SA 617 (A)

³¹ Ibid in para 17

benefit and the life cover benefit was available to Navigare's employees from the first working day on which the policy commenced in respect of each employee.

[32.5] Thus, payment of the proceeds is due by Discovery to Mrs Radebe, in her official capacity as executrix of the deceased estate, and the right to claim payment on behalf of the deceased estate confers locus standi on Mrs Radebe to institute these proceedings against Discovery.

Second Exception

[33] The second defendant contends that in a claim for damages arising from breach of contract, the plaintiff must allege and prove a causal link between the alleged breach and the claimed damages.³² It is not sufficient for the plaintiff to allege a mere legal conclusion (such as a causal link). He must allege the facts which support the legal conclusion.³³

[34] Where the pleaded facts do not establish a basis for factual or legal causation, the pleading is excipiable.³⁴

[35] *In casu*, the plaintiffs allege that the breaches pleaded in paragraph 19 caused the first and second plaintiffs to suffer damages³⁵. However, they do not plead the facts which are necessary to support this legal conclusion.

[36] Essentially, the question is, but for the alleged breaches by the second defendant, would the second plaintiff have been entitled to the payment under the policy. This the second defendant avers that the plaintiffs do not plead facts which establish a causal link between the alleged breaches and the claimed damages because they do not plead that³⁶:

³² Amler's Precedents of Pleadings (9th ed) at pa.114 and 115 (and the cases cited on p. 115.

³³ Trope *supra*.

³⁴ VM and Another v Member of the Executive Council for Education, Eastern Cape Provincial Government and Others (360/2019) [2020] ZAECHC 32 at paras 20 to 23.

³⁵ Particulars of claim para 20

³⁶ Caselines paginated pgs. 005-13

[36.1] But for the breaches allegedly committed by the second defendant, the second defendant, would have given written notice of acceptance of the benefits under the policy;

[36.2] But for the breaches allegedly committed by the second defendant, the remaining conditions precedent in the policy would have been fulfilled.

[37] The second defendant/ excipient further contends that there are no allegations at all, which support the allegation that the first plaintiff has suffered damages.

[37.1] The allegation (in paragraph 20 of particulars of claim) which alleges that the first plaintiff has suffered damages is contradicted by the subsequent allegation(in paragraph 27 of the particulars of claim) that it was the deceased and the second plaintiff who suffered the damages.

[37.2] In a contract for the benefit of a third party, contends the second defendant/excipient further that, the promisee (in this case the first plaintiff) may only sue for damages which he has personally suffered.³⁷ He may not sue for damages some other person (*in casu* the second plaintiff) has alleged suffered³⁸.

[38] The first and second plaintiff aver that this ground of exception lacks merit for the following reasons:

[38.1] Where the risk event has occurred in respect of which cover has been provided in terms of the policy, the proceeds must be paid by the insurer pursuant to the provisions of the policy. This conclusion renders the question of causation superfluous.³⁹ Accordingly, in the present matter, the plaintiffs are not required to deal with the element of causation.

[38.2] In *Guardrisk*, the court held that the insured peril had occurred and was covered by the policy, thus rendering the enquiry into causation superfluous. Nevertheless, the

³⁷ *Bagradi v Cavendish Transport Co Pty Ltd* supra at p 668H.

³⁸ *Caselines* paginated pgs. 005-13

³⁹ *Guardrisk Insurance Co Ltd v Café Chameleon CC* 2021 (2) SA 323 (SCA) para 34

court dealt with the enquiry into causation since the defendant's case was centered on a lack of causation.⁴⁰

[38.3] Clauses 11 and 12 of the Policy, being Annexure C of the particulars of claim, makes it clear that eligible employees are the full-time employees in the service of Navigare who have not yet reached the benefit expiry age of 65. Furthermore, in terms of clause 4.2 of the Policy, the cover provided is the unapproved life cover benefit and income continuation benefit for employees/members.

Third Exception (as amended)

[39] Counsel for the second defendant/excipient contends, that this third exception goes right into the root of the first and second plaintiff's/respondent's cause of action for specific performance. This is because this exception deals with the fatal and fundamental flaw in the particulars of claim, it is a defect which the first and second plaintiffs/respondents are unable to cure and remedy. The upholding of this exception on its own will bring an end to this litigation. According to the second defendant /excipient the **Group Risk LIFE PLAN**⁴¹ application form provided that :

[39.1] “ *Discovery Life assumes no liability for any employee/member or dependent until such time as written notice of acceptance of the benefits is Given by Discovery Life*”. (clause 6)

[39.2] “ Eligible employee will mean a full- time employee in the service of the employer who has not yet reached the benefit expiry age, Service will mean uninterrupted, active, permanent employment with an employer for not less than twenty-five hours per week”. (clause 10)

[39.3] “Medical evidence will be required for cover that is in excess of the free CoverLimit (FCL). The cover in excess of the FCL will be granted once the required Medical evidence has been submitted to the satisfaction of Discovery Life.

⁴⁰ Ibid in paras. 34 to 42

⁴¹ Annexure “C” to Particulars of claim -caselines paginated pgs. 002-29

The contract to be issued to the policyholder will incorporate the standard terms, conditions and rules for the type of policy and benefits applied for." (clause 13)

[39.4] "A contract will not commence, and no liability whatsoever will attach to Discovery Life as a result of this contract unless and until all outstanding premiums have been paid and written notice of acceptance of the risk has been given by Discovery Life".(clause)14.

[40] These condition, argued the counsel for second defendant/excipient limited the promise in its entirety by providing that there would be no cover, or only Free Cover, unless the conditions were fulfilled.

[41] Therefore, the conditions constitute true conditions precedent to the insurer's liability to pay the insured in respect of any employee, member or dependant.

[42] The insured bears the burden to prove that the condition upon which its claim depends was fulfilled and must plead fulfilment of the condition⁴².

[43] The plaintiffs do not seek payment of the Free Cover Limit. Instead they seek payment of the Full Cover benefit amount in respect of the deceased,

[44] The second defendant contends further that the plaintiffs do not plead:

[44.1] Discovery gave written notice of acceptance of benefits under the policy (as required by clause 6)

[44.2] That the deceased was a full time employee of the first plaintiff or that he had not reached the benefit expiry age (as required by clause 10);

[44.3] That the required Medical evidence (which would entitle the first plaintiff to claim the benefits in excess of the Free Cover Limit) had been submitted to, and accepted by Discovery (as required by clause13);

⁴² Eagle star supra , Resisto Diary supra

[44.4] That Discovery had given written notice that it had accepted the risk (as required by clause 14).

[45] Consequently, the plaintiffs have failed to plead fulfilment of the condition's precedent, and the particulars of claim do not disclose a valid cause of action for specific performance under the contract⁴³.

[46] The first and second plaintiffs aver that this ground of exception lacks merit for the following reasons:

[46.1] In paragraph 19.5 of the particulars of claim, the plaintiffs allege that "notwithstanding the timeous receipt of all premiums due by the deceased and his acceptance into the Group Scheme, the second [defendant] (erroneously referred to as the second plaintiff) failed to honour payment of the full cover". These allegations indicate compliance with the provisions of clause 6 of the policy.

[46.2] In paragraphs 15 to 17 of the particulars of claim, the plaintiffs allege that a contract of insurance was concluded between Navigare and Discovery, that the deceased was included in the group Insurance scheme and that Discovery undertook to insure the deceased for the full cover under the insurance agreement. These allegations indicate compliance with the provisions of clause 6 of the policy;

[46.3] In paragraphs 5.1 to 5.3 of the particulars of claim, the plaintiffs allege that, at all material times, the deceased was the CEO of Navigare, that all of Navigare's employees participated in the Group Insurance Cover underwritten by Discovery and that the deceased participated in the Group Insurance Cover, thus indicating compliance with the provisions of clause 10 of the Policy;

[46.4] In paragraphs 19.3 and 19.4 of the particulars of claim, the plaintiffs allege that Discovery breached the provisions of the policy by failing to provide, within a reasonable time after inception of the policy, information pertaining to the requirement of providing medical evidence and by failing to timeously call upon the deceased to submit to such medical examinations as Discovery deemed necessary. These allegations indicate that the plaintiff relies on a breach by Discovery of the

⁴³ Caselines paginated pgs. 005-15

provisions of clause 14 of the Policy to claim specific performance of payment of the proceeds from the Full Life Cover Insurance Benefit; and

[46.5] In paragraph 19.5 of the particulars of claim, the plaintiffs allege the timeous payment of the premiums due, and the acceptance of the deceased as a member of the Policy, thus indicating compliance with clause 14 of the Policy.

Legal framework and General Principles.

[47] **Rule 23(1)** provides that:

“ where any pleadings is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filling any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph(f) of subrule (5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by the notice afford his opponent an opportunity to remove the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due deliver his exception”⁴⁴.

[48] The Court general approach to exception is that;

[48.1] First, the court must take all the plaintiffs' allegations at face value. The allegations of fact in the particulars of claim must be accepted as true and correct.⁴⁵

[48.2] Second, the Court may not have regard to any extraneous fact or document⁴⁶

⁴⁴ Rules of Court- Provincial and Local Divisions ;Civil Procedure in the Supreme Court by Harms.

⁴⁵ *Stewart v Botha* 2008 (6) SA 310 (SCA) at para4; *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) at 755

⁴⁶ *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A) 834; *Koth Property Consultants C C v Lepelle-Nkumpi Local Municipality Ltd* 2006 (2) SA 25 (T) paras 20- 22, *Serobe v Koppies Bantu Community School Board* 1958 (2) SA 265(O)

[48.3] Third, exceptions must be judged on the interpretation of the pleadings most favourable to the plaintiffs:

[49] The excipient must show that, read as a whole, the pleading is excipiable on every possible interpretation that can reasonably be attached to it. It is for the excipient to satisfy the court that the cause of action or conclusion of law, for which the plaintiff contends, cannot be supported on every interpretation that can be put upon the facts.⁴⁷

[50] An over-technical approach must be avoided⁴⁸. The purpose of the exception is not to scrutinise pleadings for every possible flaw and imperfection. It is to protect litigants against claims that are bad in law or where the contents of the pleading are so vague that it is impossible to determine the nature of the claim.⁴⁹

[51] Fourth, an exception that the pleadings are vague and embarrassing will be upheld only if it goes to the root of the plaintiff's cause of action. Such an exception cannot be directed at a particular paragraph within a cause of action, it must be demonstrated that the whole cause of action is vague and embarrassing.⁵⁰ Such an exception strikes should strike at the formulation of the cause of action and not its legal validity.⁵¹ Rule 18(4) provides that :“every pleading shall contain a clear and concise statement of the material facts upon which the pleader relied for his claim”.

[52] In *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-H the court dealing with the purpose of pleadings said the following “ at the outset it need hardly be stressed that: 'The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed'. See also (*Durbach v Fairway Hotel Limited* 1949 (3) SA 1081 SR

⁴⁷ *H v Fetal Assessment Centre* 2015 (2) SA 193 CC para 10; *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) para 6 and 36

⁴⁸ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para 3

⁴⁹ *Kahn v Stuart* 1742 CPD 386 at 391; *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547(A) 553F-I

⁵⁰ *Carelsen v Fairbridge, Ardene and Lawton* 1918 TPD 306 at 309; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 863 (W) at 899B-900C

⁵¹ *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269I

at 1082). This fundamental principle is similarly stressed in Odgers' Principle of Pleading and Practice in Civil Actions in The High Court of Justice 22nd ed at 113:

"The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision."

[53] In *Lochat v Minister of the Interior* 1960 (3) SA 765 (D) Henochsberg J said :

"Where a statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied upon by the pleader".

[54] In *Trope v South African Reserve Bank and another* 1992 (3) SA 208 (T)⁵², McCreath J said the following regarding the approach to determining whether a pleading is vague and embarrassing as follows:

"Particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made".

[55] In Beck's Theory and Principles of Pleading, the learned authors say that an exception may be taken against a pleading on the basis that it is vague and embarrassing if it is "worded in such a way that the opposite party is prevented from clearly understanding the case he or she is called upon to meet"⁵³.

[56] It is further well established averments in a pleading which are contradictory, and which are not pleaded in the alternative are patently vague and embarrassing.⁵⁴

⁵² *Trope v South African Reserve Bank supra* at 210G-211H; *Confirmed on appeal*.

⁵³ *Becks supra* at par 8.1.4 p.132

⁵⁴ *Trope v South African Reserve Bank and another* 1992 (3) SA 208 (T) at 211E; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 August 2021 at para [16] ; *Bula Communication Technologies (Pty) Limited v Dell Computer (Pty) Limited* 2014 JDR 0575 (GSJ) at para 25.

[57] " A man who has not an explicable cause of action is in the same position as one who has no cause of action at all".⁵⁵

[58] A summons is vague and embarrassing where:

[58.1] It is not clear whether the plaintiff sues in a delict or in contract⁵⁶.

[58.2] It is not clear on what delictual basis (or contractual basis) the plaintiff sues (for example, it is unclear whether the claim is one for specific performance or damages).⁵⁷

[58.3] The pleading leaves one guessing as to its true import (even if it were possible to plead thereto by way of a simple denial).⁵⁸

[58.4] The pleading contains contradictory statements which are not pleaded in the alternative.⁵⁹

[59] The Court in *Welworths Bazaars supra* concluded that :

" In the case of the City of Cape Town v National Meat Suppliers Ltd (1938 CPD 59, Davis J indicated plainly that a declaration which contained a claim on tort and on breach of contract, and in which two kinds of actions were mixed up together and not alleged separately in the alternative was excipiable. The result is that the Court finds that the declaration is bad on ground that it is vague and embarrassing, and the plaintiff (the respondent) is ordered to pay the costs of this exception and application to strike out ".

⁵⁵ Schreiner J in *Gelz v Pahlavi* 1943 WLD 142 at 145.

⁵⁶ *Welworths Bazaars Ltd v Chandlers Ltd* 1948 (3) 348 (W); *Dunn and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) at 224G; Erasmus, Superior Court Practice at D-301 and the cases cited at footnote 1.

⁵⁷ *Kock v Zeeman* 1943 OPD 135 at 139.

⁵⁸ *Trope supra* at 211D

⁵⁹ *Trope v South African Reserve Bank and another* 1992 (3) SA 208 (T) ; *Bula Communication Technologies (Pty) Limited v Dell Computer (Pty) Limited* 2014 JDR 0575 (GSJ) at para 25.

[60] In reaching the above conclusion, the Court in Welworths Bazaars said of the pleading in question (which pleaded elements of both a claim in contract and in delict):

" The ordinary reader of this declaration would be puzzled to know whether the action is based on delict or on breach of contract or on both. The declaration does not boldly and unequivocally select either line, nor does it plainly and unmistakably purport to base the action on both. It seems to balance itself precariously on the tight rope of division between the two, now threatening to fall on one side, now on the other, and in the end, it recovers its balance and staggers awkwardly still balanced dangerously on the tight rope of division. Such a declaration is, in my opinion, more embarrassing than a declaration which embarks boldly upon one or other of the two actions, or that boldly asserted that the claim was based on both actions".

Principles applicable to Conditions Precedent in Insurance contracts

[61] A condition is a provision in a contract that, on the occurrence of a future event, an obligation will either come into effect or be discharged. A condition is a condition precedent if the insured is only entitled to claim performance upon fulfilment of the condition.

[62] If an insured wishes to rely on a contract of insurance containing a condition precedent, he bears the burden of proving that it has been fulfilled⁶⁰. By contrast, the insured will bear the burden of proving that a particular exclusion applies.

[63] Whether a clause is *limitation*, or an *exclusion* depends upon whether it qualifies the entire promise. If it does it is a limitation (and a condition precedent to liability under the policy), If it does not, it is an exclusion (and the insured bears the burden of proving that the exclusion applies).⁶¹

⁶⁰ Seen for example *Osbourne v West Dunes Properties 176 (Pty) Ltd* 2013 (6) SA 105 (WCC) at para 21-26

⁶¹ *Resisto Dairy (Pty) Ltd v Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 664G

[64] By way of example:

[64.1] If an insurance policy provides that the insurer will indemnify the insured in respect of loss caused by "non incendiary fire" (i.e. a fire intentionally started by a person), then the "non incendiary" which qualifies the word "fire" (and the promise as a whole) will be a limitation. The insured will bear the onus to prove that the fire was "non incendiary".

[64.2] By contrast if the policy provides that the insurer will indemnify the insured against all loss caused by fire. But then goes on to say that loss caused by a fire started by a person shall not be covered, then that "exception" (which does not qualify the whole promise but rather subtracts a species of risk from the ambit of the whole promise) will be an exclusion and not a limitation. The insurer will bear the burden of proving that the exclusion applies if it wishes to resist the claim.

[64.3] The case of *Eagle Star Insurance Co Ltd v Willey*⁶² dealt with an insurance policy which indemnified the insured "...in the event of an accident caused by or through or in connection with any motor car described in the schedule hereto against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of (1) death of or bodily injury to any person not being a member of insured's household..." A passenger in the insured's car was injured in a collision and brought an action against the insured claiming damages on the ground of negligence. The insured brought an action against the insurer claiming a declaration that the insurer was liable to indemnify him. The insured did not plead that the passenger was not a member of his household. The insurer excepted to the declaration as disclosing no cause of action. The Appellate Division upheld the exception. Centlivres CJ said:

"If I have to decide this case according to what appears to be the accepted law in regard to certain types of insurance such as marine and fire then it appears that I must pay particular attention to the form of language used. In

⁶² 1956 (1) SA 330 (A)

the present case there is no doubt in my mind that the words 'not being a member of the insured's household' qualify the words 'any person' and are not cast in the form of an exception to a general liability. In the result, therefore, the onus rests on the insured to prove that his passenger was not a member of his household. Consequently, as there is no allegation in the declaration to this effect the appeal should succeed".

Application of the law to the facts.

[65] The first and second plaintiffs/respondents have attached to their particulars of claim the duly signed **Group Risk LIFE PLAN** as annexure ("C")⁶³. This document the Court considers same to be core and fundamental to this claim for the reasons mentioned *infra*. I will now foreground and focus most importantly on the third ground of exception. Since both the first and second plaintiffs/respondents have conceded in the particulars of claim that they seek specific performance of the payment of the Full Life Cover Insurance Benefit⁶⁴. It is my firm view, in light of the facts pleaded mentioned *supra* that deciding only this core issue will serve the fundamental purpose of exception proceedings: to weed out bad claims at an early stage⁶⁵.

[66] The relevant section of the annexure ("C")- **Group Risk LIFE PLAN** is section 14. **Terms and Conditions**⁶⁶

[66.1] " *Discovery Life assumes no liability for any employee/member or dependent until such time as written notice of acceptance of the benefits is Given by Discovery Life*". (clause 6)

[66.2] " *Eligible employee will mean a full- time employee in the service of the*

⁶³ Caselines paginated pgs. 002-21

⁶⁴ See caselines paginated pgs. 005-54 par 67

⁶⁵ Pretorius and Another v Transport Pension Fund and Another 2019 (2) SA 37 (CC) para 15.

⁶⁶ Caselines paginated pgs. 002-30.

employer who has not yet reached the benefit expiry age, Service will mean uninterrupted, active, permanent employment with an employer for not less than twenty-five hours per week". (clause 10)

[66.3] **"Medical evidence will be required for cover that is in excess of the free Cover Limit (FCL). The cover in excess of the FCL will be granted once the required Medical evidence has been submitted to the satisfaction of Discovery Life. The contract to be issued to the policyholder will incorporate the standard terms, conditions and rules for the type of policy and benefits applied for."** (clause 13)

[66.4] *"A contract will not commence, and no liability whatsoever will attach to Discovery Life as a result of this contract unless and until all outstanding premiums have been paid and written notice of acceptance of the risk has been given by Discovery Life".(clause)14.*

[67] This condition limited the promise in its entirety by providing that there would be no cover, or only Free Cover, unless the conditions were fulfilled. Therefore, the conditions constitute true conditions precedent to the insurer's liability to pay the insured in respect of any employee, member, or dependant. The insured bears the burden to prove that the condition upon which its claim depends was fulfilled and must plead fulfilment of the condition⁶⁷.

[68] No where in the particulars of claim has the first and second plaintiffs/respondents pleaded that;

[68.1] second defendant/excipient gave written notice of acceptance of benefits under the policy (as required by clause 6)

[68.2] That the required Medical evidence (which would entitle the first plaintiff to claim the benefits in excess of the Free Cover Limit) had been submitted to, and accepted by second defendant/excipient (as required by clause13);

⁶⁷ *Resisto Dairy (Pty) Ltd v Protection Insurance Co Ltd* 1963 (1) SA 632 (A)

[68.3] That second defendant/excipient had given written notice that it had accepted the risk (as required by clause 14).

[69] No where in the particulars of claim has both the first and second plaintiffs/respondents pleaded that the clause 6, clause 13, and clause 14 has been complied with to the satisfaction of second defendant/excipient and that the written notice was thereafter given in respect of the deceased Mr Radebe that the second defendant/excipient had accepted the risk.

[69] The Court find that the first and second plaintiffs/respondents have failed to plead fulfilment of these conditions precedent to the **FULL COVER LIFE INSURANCE BENEFIT** and the particulars of claim do not disclose a valid cause of action for specific performance under the contract. Failure to plead the fulfilment on all the conditions precedent to the Full Cover as mentioned *supra* is fatal to the first and second plaintiffs/respondents claim. The allegations pleaded as mentioned *supra* does not disclose the right to claim specific performance. To the fundamental question raised *supra* whether the particulars of claim as they stand disclose a right to claim the specific performance of a full cover life insurance benefit, having considered the documents filed of record and having listened to both counsels the answer is negative.


[69] Consequently, the Court find that the first and second plaintiffs/respondents particulars of claim are vague and embarrassing in that they fail to disclose a cause of action, that the second defendant/excipient would be gravely prejudiced were it required to plead to the particulars of claim as they currently stand.

[70] The following order is made:

[70.1] The exception is upheld with costs;

[70.2] The first and second plaintiffs/respondents are given leave to amend their particulars of claims within one month of the date of this order;

[70.3] If the first and second plaintiffs/respondents do not so amend their particulars of claim, their claim against the second defendant/excipient be set aside.



J YENDE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Heard: 30 May 2023

Delivered: 21 August 2023