Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No:	2201 /2021
Heard on:	03/06/2022
Delivered on:	02/09/2022

In the matter between:

INGRID SAMPSON **PLAINTIFF**

and

LEGAL AID SOUTH AFRICA **DEFENDANT/EXCIPIENT**

JUDGMENT

MAMOSEBO J

[1] The excipient, Legal Aid South Africa, excepts to the plaintiff's particulars of claim in terms of Rule 23 of the Uniform Rules of Court on the grounds that the claim lacks the allegations necessary to sustain a cause of action against it. For convenience, I shall refer to the parties as plaintiff and the excipient/defendant.

[2] A synopsis of the facts as pleaded in the particulars of claim is as follows: The plaintiff is married to Mr Brett Sampson, formerly employed by the excipient as its Civil Principal Attorney. Mr Sampson's office is situated at Pretmax Building, 4 Sydney Street, Kimberley. The defendant had a legal duty (duty of care) towards its employees, which duty includes:

(a) providing a safe employment environment;
(b) preventing harm befalling them at their workplace;
(c) preventing them from being exposed to dangerous employment situations and/or to a dangerous work environment;
(d) ensuring safe working conditions;
(e) putting reasonable measures and/or security measures and/or safety precautions in place in order to establish secure; protected and/or guarded work premises;
(f) preventing unauthorised access to the defendant's place of employment; and
(g) doing all things necessary to protect its employees, including Mr Sampson, against assaults and other unlawful acts by third parties.

[3] It is alleged that on 24 October 2018 Mr Sampson was assaulted or attacked at work by three unknown people at the lifts and/or elevator in the lobby at Pretmax Building as a result of which he sustained serious injuries. The plaintiff pleads that the attack resulted from the wrongful negligence and negligent breach of the defendant's legal duty by:

(a) not providing the presence of security guards or personnel at the elevator and/or entrance to the offices in the building;
(b) not preventing the attackers from entering the building;

(c) not preventing the attackers from entering the elevators and/or aisles of the Pretmax Building;

(d) not ensuring that entry into the Pretmax Building and/or entry to the offices in the Pretmax Building is security controlled; and

(e) failing to take reasonable measures to safeguard the employees of the defendant.

[4] Mr Sampson sustained the following injuries: severe concussion and head trauma; fracture of his right arm causing a previous open reduction and fixation to dislodge; multiple areas of tenderness and bruising over his back and rib area; damage to his inner left ear causing a hearing impediment; and cataracts on both eyes. Resultantly, he was hospitalised and received extensive medical treatment. He has not returned to work and has not received his employment benefits and/or salary from the defendant. He is unable to practice as an attorney in the employment of the defendant or at all.

[5] The plaintiff now claims damages against the excipient in the amount of R2 Million. Her cause of action is outlined in paras 9 and 10 of the particulars of claim as follows:

> *"9. As employer, the defendant owed a duty of care (legal duty) to avoid the infliction of psychiatric illness on relatives of its employees, and in particular plaintiff, through nervous shock sustained by reason of physical injury or peril to its employees and in particular to Brett.*
>
> *10. Defendant has breached its duty towards plaintiff as it has breached its duty of care towards Brett as set out in paragraph 4 above."*

[6] The excipient contends that the plaintiff's claim lacks the allegations necessary to sustain a cause of action based on the following two grounds that even if the factual allegations in the particulars of claim made against the excipient are assumed to be true:

6.1 they do not establish wrongfulness and are not susceptible in law of sustaining a finding that the excipient had a duty of care to avoid loss being caused to the plaintiff, failing which, she would have a damages' claim against the excipient ; and

6.2 the pleaded causal nexus between the excipient's conduct and the plaintiff's losses are too remote to give rise to a delictual claim.

[7] In *Hlumisa Investment Holdings RF LTD and Another v Kirkinis and Others*[1] Navsa JA made these instructive remarks:

> *"[22] In deciding an exception a court must take the facts alleged in the pleading as being correct. It is for the excipient to satisfy the court that the conclusion of law set out in the particulars of claim is unsustainable. The court may uphold the exception only if it is satisfied that the cause of action or conclusion of law cannot be sustained on every interpretation that can be put on those facts. As Harms JA noted in Telematrix, exceptions* are *a useful tool to 'weed out' bad claims at an early stage and an unnecessarilytechnical approach is to be avoided. The facts are what must be accepted as correct; not the conclusions of law."*

[8] In an exception the excipients have, in the first place, to show that the pleading is excipiable on every interpretation that can reasonably be attached to it and; secondly, the plaintiff is confined to the facts alleged in the Particulars of Claim, apart from any further facts which the parties may have agreed might be taken into account. See *First National Bank of Southern Africa Ltd v Perry NO and Others*[2].

[9] Adv Hefer SC, for the plaintiff, expressed surprise that the defendant took exception to the plaintiff's particulars of claim and the demand for the plaintiff to establish wrongfulness. According to counsel the plaintiff's

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[1] 2020 (5) SA 419 (SCA) at 432 para 22
[2] 2001 (3) SA 960 (SCA) at 965 C – D.

legal team were served by the Legal Aid South Africa with a special plea of injury on duty which resorts under s 35 of the Compensation for Occupational Injuries and Diseases Act[3] as amended (COIDA) in the matter of *Brett Sampson v Legal Aid South Africa* under case number 2200/2021. Counsel submitted that it is for this reason that evidence is necessary to show that the incident was indeed an occupational injury and the *onus* lies with the plaintiff. Counsel went on to explain that the plaintiff's incident flows from Mr Sampson's and the possibility exists that the matters may be consolidated and heard together. Counsel further intimated that Mr Sampson's claim amounts to R76 million.

[10] I am mindful of the fact that the aforementioned exposition does not form part of the pleadings in the current matter and the determination as informed by the authorities cited herein that when an exception is taken against a pleading the Court looks at the pleading as it stands. However, Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*[4] commented on the objection by counsel to the Court having regard to the totality of the pleadings counsel had contended that the Court confine itself to the consideration of facts alleged in the body of the particulars of claim in isolation. The Court found the objection to be unmeritorious.

[11] The issue is whether, in the circumstances pleaded, the plaintiff's particulars of claim disclose a cause of action against the excipient.

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[3] 130 of 1993

[4] 2006 (1) SA 461 (SCA) at 467 para 10

The First Ground of Exception

[12] The excipient's first ground of exception is that the facts as pleaded by the plaintiff, even if they can be taken as true, do not establish wrongfulness and are not susceptible in law to sustain a finding that the excipient had a duty of care to avoid loss being caused to the plaintiff, failing which, she would have a damages claim against the excipient.

[13] The question that arises on the issue of wrongfulness is whether public- or legal-policy considerations dictate that the excipient be held liable to the plaintiff for the injuries sustained as a result of her husband's injuries.

[14] Mr Hefer contended that whereas the first ground is based on the fact that wrongfulness is excluded by the provisions of s 35(1) of COIDA, the court cannot, on exception, find that the incident during which Mr Sampson was injured can be found to be an occupational injury without evidence being led in that regard.

[15] Adv Scott, for the excipient, contended that wrongfulness is a necessary element in assessing a claim for delictual liability. In order to substantiate the question whether the excipient's conduct, which is claimed to be responsible for the plaintiff's loss should be classified as wrongful, counsel relied on *Home Talk Developments v Ekurhuleni Metropolitan Municipality*[5] where Ponnan JA, writing for a unanimous court, pronounced:

> *"[20] Conduct is wrongful in the delictual sense if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. It is then that it can be said that the legal convictions of society regard the conduct as wrongful. 'Wrongfulness', the Constitutional Court held, 'typically acts as*

[5] 2018 (1) SA 391 (SCA) at para 20

a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability'. It elaborated: '[wrongfulness] functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether "the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue".' What is called for is 'not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.'"

[16] The Supreme Court of Appeal (SCA) in *Hlumisa*[6] made the following pronouncements:

"[64] The appellants submitted that it would not be appropriate to decide wrongfulness on exception. In this case, as in all cases in which a plaintiff claims damages for pure economic loss, it is incumbent that the facts upon which such a plaintiff relies for its contention that the loss was wrongfully caused be pleaded. The pleadings are thus the high-water mark of its case on wrongfulness. In Telematrix supra [22] para 2 this court noted that it has often determined wrongfulness on exception.

[65] In Telematrix para 3 Harms JA said that '(s)ome public policy considerations can be decided without a detailed factual matrix, which by contrast is essential for deciding negligence and causation. In AB Ventures Ltd v Siemens Ltd 2011 (4) SA 614 (SCA) ([2011] ZASCA 58) para 5 Nugent JA noted that in a case such as this, the issue of wrongfulness is 'quintessentially a matter that is capable of being decided on exception'."

[17] In the plaintiff's particulars of claim referred to at para 5 (above) she is claiming for psychiatric illness. Mr Scott conceded that the claim falls under the ambit of a recognised delictual claim at common law. See *Komape and Others v Minister of Basic Education and Others*[7].

[18] From the factual matrix in the plaintiff's particulars of claim, it is pleaded that the excipient owed but has breached a duty to provide a safe working environment to its employees, including her husband and that it is breach of that duty that gave rise to her claim. Negligent causation of pure economic loss is not regarded as *prima facie* wrongful. Its wrongfulness

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[6] Ibid at paras 64 and 65

[7] 2020 (2) SA 347 (SCA) at 357 para 26 -358 para 27

depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public- or legal-policy consistent with constitutional norms.[8]

[19] Nugent JA restated the principle that assists the courts against uncertainty and unpredictability in *Minister of Safety and Security v Van Duivenboden*[9] and held:

> *"When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms."*

[20] It is necessary to identify the considerations of policy that are of relevance in the light of these insightful remarks by Brand JA in *Fourway*[10]*:*

> *"[17] We therefore strive for certainty. The question is, how can that be achieved in an area directed by considerations of public or legal policy? I believe we must accept at the outset that absolute certainty is unattainable. The moment this court took the first tier policy decision – in Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) – to abolish the absolute exclusion of liability for pure economic loss, it abandoned the bright line of absolute certainty. The second tier policy decision as to when liability should be imposed must of necessity be accompanied by some degree of uncertainty, at least at the early stages of development in this area of the law. That much was recognised and predicted by Rumpff CJ in Administrateur, Natal itself (see 831B). This measure of resulting uncertainty also seems to be an experience shared by those jurisdictions where the same first tier policy decision has been taken. Thus it was stated, for example, by Gaudron J in the Australian High Court, in Perre v Apand (Pty) Ltd 1999 198 CLR 180 (HC of A) para 25:*
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> *'The law as to liability for economic loss is a "comparatively new and developing area of the law of negligence". It has not yet developed to a stage where there has been enunciated a governing principle applicable in all cases. Perhaps it never will.'*

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[8] Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009 (2) SA 150 (SCA) at 156 para 12
[9] 2002 (6) SA 431 (SCA) para 21
[10] Ibid para 17

And by McLachlin J in the Canadian Supreme Court in Canadian National Railway Co v Norsk Pacific Steamship Co Ltd (1992) 91 DLR (4th) 289 at 366:
'Judges seem able to pick out deserving cases when they see them. The difficulty lies in formulating a rule which explains why judges allow recovery of economic loss in some cases and not in others.'
(Compare also K Zweigert & H Kötz An Introduction to Comparative Law 3 ed 625 et seq; B S Markesinis The German Law of Torts, A Comparative Introduction 3 ed 42 et seq; Daniel Visser & Niall Whitty The Structure of the Law of Delict in Kenneth Reid and Reinhard Zimmermann A History of Private Law in Scotland Vol II Obligations 461 et seq.)"

The SCA continued:

"[19] Another attempt at a bright line rule is often referred to as 'the three-stage test' which is attributed to a passage in the speech of Lord Bridge of Harwich in Caparo Industries PLC v Dickman [1990] 2 AC 605 (HL) at 617-618. (See eg D v East Berkshire Community Health NHS Trust [2005] 2 AC 373 (HL) para 2 where reference is made to 'the familiar test laid down in Caparo'. See also Sutradhar v Natural Environment Research Council [2006] 4 All ER 490 (HL) para 32.) According to this test a plaintiff can establish wrongfulness (in the South African sense) only when it can prove three things: first, that the causing of damage was reasonably foreseeable; secondly, that a relationship of 'proximity' or 'neighbourhood' existed between the parties; thirdly, that in all the circumstances of the case, it is fair, just and reasonable to impose liability on the defendant. Somewhat ironically, however, Lord Bridge never claimed to create a bright line rule. He did not even profess to formulate a 'test'. That, I think, is apparent from the very passage in his speech usually relied upon in support of the 'three-stage test'. After Lord Bridge referred to the ingredients of foreseeability, proximity and the situation in which the court considers it fair, just and reasonable to impose liability, he continued (at 618A-B):

'[T]he concepts of proximity and fairness . . . are not susceptible of any precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to features of different specific situations which . . . the law recognises pragmatically as giving rise to a duty of care . . ..'

And in the same case Lord Oliver of Aylmerton said (at 633F):

'I think that it has to be recognised that to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the-wisp.'"

[21] The plaintiff found herself in a precarious situation following her husband's attack. The incident made her vulnerable. There is nothing that she could have done to protect herself or her husband against that

risk. The plaintiff's pleadings encapsulate all the policy considerations that must be taken into account.

[22] While on the one hand Mr Scott conceded to the common law claim of psychiatric illness he, on the other hand, relied on s 35(1) of COIDA when making the submission that such a claim is statutorily excluded against employers brought by an employee or their dependants.

[23] Section 35(1) provides:

> *"No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."*

[24] It was argued on behalf of the excipient that the plaintiff is a dependant of an employee as defined in COIDA. Since her claim is predicated on the allegation of a breach of a duty of care by the excipient, owed to Mr Sampson as its employee, it therefore means that the damages Mrs Sampson is claiming are in respect of any occupational injury resulting in the disablement of Mr Sampson. Consequently, the argument went, the statutory bar is applicable in the pleaded circumstances.

[25] In countering this submission Mr Hefer contended that evidence is necessary to show that the incident was an occupational injury and that the *onus* is on the plaintiff to do so. Invoking *MEC for Health, Free State v DN*[11] the question that stood to be answered by the appeal court was whether the Department of Health, Free State Province, was notionally liable to the female doctor for damages sustained as a result of her being

[11] 2015 (1) SA 182 (SCA) at 196 para 31

raped by an intruder who had gained access to the hospital premises. The SCA confirmed the findings of the trial court holding that the question to be answered was whether the act causing the injury was a risk incidental to the employment. The Court accepted, however, that there was no bright-line test and each case has to be dealt with on its own merits. The Court reasoned that it was difficult to see how a rape perpetrated by an outsider on a doctor on duty at a hospital, could have arisen out of her employment. This then brings into the picture the need for evidence to substantiate the applicability of s 35(1) under these circumstances.

I am constrained to agree with Mr Hefer that evidence is necessary to establish whether the injury was an occupational injury.

The second ground of Exception

[26] Even if the facts in the particulars can be assumed to be true the pleaded causal *nexus* between the excipient's conduct and the plaintiff's loss is too remote to give rise to a delictual claim.

[27] Pertaining to the second ground of remoteness of damages it was submitted on behalf of the plaintiff that the court hearing the exception is not in a position to find that these damages are too remote before evidence had been led on the facts. It is for this reason that the plaintiff maintains that the matter must go to trial.

[28] The aspect of the remoteness of damages brings me to the issue of causation. As explained by Corbett CJ crisply in *International Shipping Co (Pty) Ltd v Bentley*[12] causation involves two distinct enquiries. The first enquiry, the factual causation, is commonly known as the 'but-for'

[12] 1990 (1) SA 680 (A) at 700E – G

test. The facts are as outlined in the particulars of claim. The excipient has not seriously contested the correctness of the facts. I say so because when taking the exception it said *'even if the facts may be assumed to be true...'*. One can still move from the premise that had the unknown men not attacked Mr Sampson Mrs Sampson would not have found a need to bring a delictual claim against her husband's employer. She would not have suffered any loss. **It can accepted that the factual causation is not in issue**.

[29] In as far as the second enquiry is concerned, that is where the dispute lies. The question is whether the conduct of the excipient is linked sufficiently closely or directly to the loss suffered by the plaintiff for it to attract legal liability or whether the loss is too remote. This is sometimes called 'legal causation'. When one determines whether legal causation exists or not considerations of policy come into play. There must be a reasonable connection between the harm threatened and the harm done. In *International Shipping*[13] the court held that the test in our law for determining remoteness is a flexible one. The SCA has cautioned that the courts should, in applying these tests, not use them dogmatically or exclusively, but rather with some measure of flexibility to avoid an unfair or unjust result[14].

I am of the view that the pleaded causal *nexus* between the excipient's wrongful conduct and the plaintiff's losses are not too remote. It therefore follows that the exception stands to fail.

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[13] Ibid 701A - F
[14] Fourway Haulage SA (Pty) ltd ibid at 165 para 34

[30] The excipient had the duty to persuade the Court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed. I am not satisfied that the excipient has discharged this duty. In my view, the particulars of claim cannot be said to be so wanting that the excipient finds difficulty in pleading thereto. In any event, a dismissal of the exception does not finally dispose of the issue raised by the exception. The point can still be argued at the trial.

[31] Counsel for the excipient submitted that should the excipient not succeed in its application and the matter is sent for trial the court should reserve the costs for later determination. There is no reason in my view why costs should not follow the result.

[32] In the result, the following order is made:

The exception is dismissed with costs.

MAMOSEBO J

NORTHERN CAPE HIGH COURT

For the plaintiff/ respondent:	Adv JJF Hefer SC
Instructed by:	David Magoma Attorneys
For the defendant/excipient:	Adv T Scott
Instructed by:	Mr AL Nobetsu Legal Aid South Africa