IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 15550/2020

In the matter between:

SB	Applicant/Respondent
and	
STORAGE TECHNOLOGY SERVICES (PTY) LTD	Respondent/Excipient

In re: the action between:

SB	Plaintiff
and	
ALFREDO WITLOUW	First Defendant
STORAGE TECHNOLOGY SERVICES (PTY) LTD	Second Defendant

Coram: Justice J Cloete

Heard: 14 October 2021

Delivered electronically: 21 October 2021

JUDGMENT

CLOETE J:

Introduction

[1] Both matters before me include a consideration of the effect of certain amendments introduced in rule 23 of the uniform rules of court (*'rule(s)'*) on 22 November 2019, and in particular rule 23(1). [1]

[2] The applicant (who is the plaintiff in the main action) seeks the setting aside of a re-delivered exception raised by the respondent (the second defendant in the main action) as an irregular step in terms of rule 30, together with other relief.

[3] The respondent opposes the application but in the event that it is granted, persists with the exception delivered prior thereto, which is in identical terms. That exception is in turn opposed by the applicant.

Relevant contextual background

[4] On 26 October 2020 the applicant issued summons against the respondent and a Mr Witlouw (as first defendant), jointly and severally, for payment of damages in the total sum of R1 165 000 arising from an alleged sexual assault perpetrated by Witlouw during the course of a job interview attended by the applicant for employment with the respondent on 24 April 2018. She alleged that at the time of the assault Witlouw, who conducted the interview,

[1] Rule 23(1) was substituted by GN R1343 of 18 October 2019, with commencement date 22 November 2019.

was employed by the respondent and acting in the course and scope of his employment. Witlouw has not defended the action.

[5] After delivery of its notice of intention to defend the respondent also delivered, on 11 February 2021, a *'Notice to Remove Causes of Complaint and Notice of Exception'* to the applicant's particulars of claim. In that notice, the respondent raised eight complaints that the particulars of claim were vague and embarrassing, and two complaints that they failed to disclose a cause of action. The respondent also gave the applicant the required 15 days notice to remove the "vague and embarrassing" complaints in accordance with rule 23(1).

[6] Having considered the exception, the applicant was of the view that only three complaints warranted attention. They all pertained to the "vague and embarrassing" category. On 9 March 2021 the applicant served her notice of intention to amend in terms of subrules 28(1) and (2). Surprisingly, given what subsequently occurred, the respondent did not object to the proposed amendments, and the applicant's amended particulars of claim were delivered on 25 March 2021 (the quantum of her claim was also increased to R2 390 000).

[7] On 1 April 2021 the respondent instead delivered a notice of exception to the amended particulars of claim (the *'April exception'*). Instead of complying with rule 23(1), i.e. affording the applicant 15 days to remove those complaints

which it maintained were vague and embarrassing, the respondent blithely alleged in the notice that:

> *'BE PLEASED TO TAKE FURTHER NOTICE that the plaintiff, having been provided a period of 15 days to remove certain of the below causes of complaint, has failed to remedy certain of the causes of complaint raised in the second defendant's notice dated 11 February 2021. Accordingly, the second defendant hereby delivers, in addition* [i.e. to those directed at the failure to disclose a cause of action]*, an exception on the basis of the particulars of claim being vague and embarrassing.'*

[8] Given that the applicant did not raise this as a further irregular step, I leave it there. The April exception however raised, in identical terms, seven of the complaints in the first (February 2021) exception despite the respondent having been aware, on its version, that the amendments which the applicant intended to make to her particulars of claim would nonetheless fail to address a number of the causes of complaint.[2]

[9] The respondent thereafter failed to apply to the registrar within 15 days of delivery of the April exception to have it set down for hearing as provided in rule 23(1). On 13 May 2021 the applicant's attorney wrote to the respondent's attorney pointing this out. The letter read in relevant part as follows:

> *'According to our calculations, your client has failed to comply with the time limits prescribed by the rules within which to set down its exception for hearing.*

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[2] It is trite that save in exceptional cases an amendment ought not to be allowed where its introduction into the pleading would render the pleading excipiable, and by parity of reasoning, the same should apply in those instances where the remaining causes of complaint are not addressed in the notice of intention to amend.

In the circumstances your client's plea is now long overdue, and unless we receive it within 7 calendar days, we will be delivering a Notice of Bar, and thereafter, will be applying for judgment by default.'

[10] On the last day of the given deadline, i.e. 20 May 2021, the respondent's attorney replied, maintaining that the April exception necessarily had to be dealt with before the respondent would be in a position to plead. He also informed the applicant's attorney that the applicant was at liberty to have the April exception enrolled for hearing. He did not however suggest that the respondent itself would, or should, take any further steps in this regard.

[11] The respondent's attorney also took the view that its failure to enrol the April exception within the 15 day period referred to in rule 23(1) did not render it "*pro non scripto*", but that *'as a matter of extreme caution, we shall serve our client's exception again and cause same to be set down for argument as soon as practically possible'.* The respondent then proceeded to re-deliver the April exception on 20 May 2021 (for convenience, the *'May exception'*). On 21 May 2021 the applicant delivered her notice of bar. It was the delivery of the May exception that also resulted in the applicant launching this application.

[12] In her amended notice of motion the applicant seeks an order in the following terms:

'1. The second defendant's exception that was delivered on 20 May 2021 is set aside as an irregular step under rule 30(1).

2. The plaintiff's notice of bar that was delivered on 21 May 2021 is declared to be a regular step.

3. The second defendant will pay the costs of this application on the scale as between attorney-and-client.

4. Further and/or alternative relief.'

[13] On 27 May 2021 the respondent delivered a notice in terms of rule 30(2)(b) affording the applicant the opportunity to remove the notice of bar as an irregular step within 10 days, failing which it would apply to have it set aside. This application was not proceeded with and requires no further mention.

Whether delivery of the May exception constitutes an irregular step

[14] Previously, rule 23(1) provided that, following delivery of an exception, the excipient *'…may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6)…'.* Rule 6(5)(f) in turn gave the excipient the opportunity, within 5 days of delivery of the exception, to apply to the registrar for the allocation of a date for hearing.

[15] I intentionally use the word "opportunity" since rule 6(5)(f)(iii) reads in relevant part as follows:

'(iii) If the applicant fails so to apply within the appropriate period aforesaid, the respondent may do so immediately upon the expiry thereof…'

[16] As presently worded, the relevant part of rule 23(1) provides that:

> *'(1) Where any pleading 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 any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception...'*
>
> [emphasis supplied]

[17] The reference to rule 6(5)(f) has thus been removed from rule 23(1), in particular that portion which entitles the other party to enrol the exception if the excipient fails to do so timeously. In contradistinction, rule 6(5)(f) is retained by oblique reference in rule 23(2), which pertains to applications to strike out.

[18] Rule 23(4) has however not been amended and stipulates that:

> *'(4) Wherever any exception is taken to any pleading… no plea, replication or other pleading over shall be necessary.'*

[19] The applicant contends that the effect of the amendment to rule 23(1) is that, if the excipient concerned fails to apply to the registrar within that 15 day period, the exception lapses and the *moratorium* contained in rule 23(4) falls away. The respondent's re-delivery of the same exception, way out of time, is therefore an irregular step, and the re-delivery itself cannot confer validity on – or put differently, breathe life into – something which has already lapsed. Accordingly, so the argument goes, the applicant was perfectly entitled to place the respondent under bar.

[20] On the other hand the respondent submits that its failure to approach the registrar within that 15 day period merely gave the applicant *'the privilege of choosing the date for hearing'* by setting down the exception, and nothing more. The respondent's attorney, who deposed to the answering affidavit, also maintained that:

> *'*[The failure to set the matter down on application to the registrar] *…does not, as the plaintiff's attorney contends, nullify the exception. However, to obviate the wasteful* [*sic*] *of incurring legal costs and wasting time in fighting an application for condonation the second defendant decided to simply re-serve the exception… which it is entitled to do. There is no rule or principle preventing this.'*

[21] The applicant's response is that such a construction is untenable, since its effect would be that the action is stymied unless and until the exception is adjudicated, and it cannot be expected of the other party to set down what it may consider to be an unmeritorious exception, thereby incurring costs, purely in order to have the action proceed. Moreover it is argued that what the respondent ought to have done was to bring a substantive application for condonation, and explain its failure to set down the April exception timeously.

[22] The respondent's retort is that if something has lapsed, as the applicant contends, then no point would be served by applying for condonation since there is nothing to revive.

[23] In my view there can be no doubt that the May exception is an irregular step, which must be set aside, for a more fundamental reason. On both parties'

versions, it was not delivered *'within the period allowed for filing any subsequent pleading'* in accordance with rule 23(1). The amended particulars of claim were delivered on 25 March 2021. The exception had to be delivered (bar an accompanying application for condonation) within 20 days thereafter, which is the time period allowed for the delivery of a plea in terms of rule 22(1), i.e. by 26 April 2021. Instead it was only delivered on 20 May 2021.

[24] The ill-advised approach adopted by the respondent's attorney clearly flouted the prescribed time period of 20 days and there is no procedural mechanism upon which the respondent can now rely to cure this fatal defect in circumstances where no application for condonation was brought. However the parties' respective arguments remain relevant to the April exception.

Whether the April exception is still extant

[25] It is not apparent why the Rules Board introduced the amendment to rule 23(1). I have not been able to find any authority subsequent to the amendment, or definitive commentary on why it was introduced, and counsel were unable to refer me to any either.

[26] To my mind however a procedural amendment to a rule regulating the conduct of proceedings in the High Court cannot be interpreted in such a way as to interfere with the long established approach of our courts to the nature of an exception for purposes of the rule. It is regarded as a pleading, not an application, and not a notice either.

[27] In *Steve's Wrought Iron Works and Others v Nelson Mandela Metro*,[3] Goosen J summed it up as follows:

> *'…Rule 23 prescribes the form of the exception as a pleading. An exception is not an application to which the provisions of rule 6 apply.'*

[28] If an exception is considered to be a pleading for purposes of rule 23, it follows that it cannot simply lapse if no further steps are taken by the excipient once it is delivered. Something more is required.

[29] This is supported by the use of the word *'may'* and not *'must'* in rule 23(1) itself. If it was intended that an exception would automatically lapse if the excipient failed to enrol it within the prescribed 15 day period, the drafter would no doubt have made this a peremptory, and not a permissive, requirement, and would also have spelt out the consequence of a failure to do so, i.e. that the exception would lapse.

[30] Although the cases make it clear that an exception may be delivered in response to a notice of bar,[4] what happened in the present matter is that a notice of bar was delivered *after* the respondent failed to take steps to enrol the April exception and simply re-delivered it (in the form of the May exception).

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3 2020 (3) SA 535 (ECP) at para [21]. See also the authorities cited therein.
4 See fn 3 above.

[31] In my view the applicant could not have competently delivered a notice of bar since a “pleading” had already been delivered. The failure by the respondent to enrol the exception within the prescribed 15 day period left the applicant with two options.

[32] The first was to apply to the registrar to have it enrolled for hearing. I do not see how the deletion of the reference to rule 6(5)(f) in the currently worded rule 23(1) prevents a party in the position of the applicant from doing so, given that she remains *dominus litis* in the action itself. The position cannot be different merely because the exception is taken to a plaintiff’s own pleading, or its plea to a claim in reconvention, as the case may be; and where a plaintiff is the party excepting to a defendant’s plea, then of course it would be the plaintiff who would no doubt apply to have the exception enrolled for hearing within the 15 day period, since it would wish to expedite the main litigation initiated at its own instance.

[33] The second option would be to put the excipient to terms to enrol the exception, under threat of an application for an order striking it out as a whole, if the excipient nonetheless persists in its failure to do so. This would address the applicant’s concern in the present matter that, in order to move the litigation forward, she herself would have to incur unnecessary costs by enrolling the exception for hearing when she considers it to be without merit.

[34] While there may be no specific rule permitting such a procedure[5] – and this is probably a matter which should be considered by the Rules Board – the High Courts nonetheless have the inherent power to protect and regulate their own process, taking into account the interests of justice in terms of s 173 of the Constitution.

[35] Having regard to the above it is my conclusion that the relief sought by the applicant in prayer 2 of her notice of motion, i.e. for the notice of bar delivered on 21 May 2021 to be declared a regular step, must fail. The April exception remains extant until it is struck out, set aside, dismissed or upheld.

[36] According to the practice note filed on behalf of the applicant for purposes of this hearing, the respondent's May exception was evidently set down on an expedited basis with leave of the Judge President. On becoming aware of this, the applicant obtained the Judge President's leave to set down her rule 30 application for hearing on the same date.

[37] I have already found that the re-delivery of the May exception is an irregular step. It is accordingly not properly before me. However I am of the view that it is clearly in the interests of justice to regard the April exception as one that I am nonetheless permitted to determine. The reasons are as follows. First, the April exception is identical to the May exception. Second, full argument was heard on the merits of the exception itself. Third, both parties clearly wish to

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[5] An analogous procedure would be that contained, for example, in rule 35(7) pertaining to discovery, which confers upon a party the right to approach a court by way of an application to compel and, failing compliance with the Order, to ask the court to dismiss the claim or strike out the defence.

have a judgment on the merits of the exception to avoid yet further delay. I thus turn to deal with the April exception on this basis.

Whether the April exception has merit

[38] Of the seven grounds of complaint, the first and last were abandoned during argument. However, for ease of reference, I will refer to the remaining grounds as they appear in the exception.

[39] The second ground relates to paragraphs 5, 7 and 9 of the amended particulars of claim ("the pleading"). In paragraph 5 the applicant pleads that *'at all times material hereto…'* Witlouw acted within the course and scope of his employment with the respondent. In paragraph 7 it is alleged that during April 2018 the applicant instituted a criminal complaint against Witlouw, as a result of which she was obliged to attend court on approximately seven occasions, only to have him plead guilty on 17 September 2019; and in paragraph 8 it is alleged that, as a consequence of the assault as well *inter alia* the criminal proceedings she suffered *'psychiatric injuries'*.

[40] The respondent's ground of complaint is that, self-evidently, Witlouw could not have been acting in the course and scope of his employment in the criminal proceedings. Accordingly, it is contended, the pleading is vague and embarrassing and/or contains insufficient averments to establish a cause of action against the respondent.

[41] It is however plain from a reading of the pleading as a whole that the words *'at all material times hereto'* pertain to the applicant's cause of action, namely the alleged assault, and that her attendance at the subsequent criminal proceedings was one of the events that followed from that assault. Put differently, absent the alleged assault, no criminal prosecution would have followed. To my mind, it is contrived and overly formalistic to suggest otherwise.

[42] The third ground pertains to paragraphs 9.4 and 9.6 of the pleading. Paragraph 9 commences with the words *'[a]s a consequence of the aforegoing psychiatric injuries, the plaintiff has endured and will continue to endure the following:…'*. In paragraph 9.4 she alleges that she has suffered a permanent loss of earning capacity, has lost income, and will lose income in the future; and in paragraph 9.6 that she will require an occupational therapy assessment to assist her with a career reintegration strategy to allow her to find work in a manner which can circumvent the *'traumatic triggers'* for her.

[43] The complaint is that paragraphs 9.4 and 9.6 are irreconcilable and mutually destructive, and the respondent is embarrassed in having to plead thereto. During argument the respondent's counsel submitted that, in its view, the alleged permanent loss of earning capacity necessarily means a total loss thereof.

[44] However this is not the only interpretation since one can have a permanent, but partial, loss of capacity. Moreover paragraph 10.3 sets out, in some detail,

the basis upon which the applicant alleges that she has suffered a past and future *'loss of earnings/loss of earning capacity'*, and in paragraph 10.3.4.2 the allegation is made that her future loss of earning capacity is *'currently estimated'* in the sum of R1 million. It is accordingly my view that the respondent has misunderstood the pleading, rather than that the pleading is excipiable.

[45] The fourth ground is that the applicant failed to plead the following in respect of Witlouw's employment with the respondent, namely: (a) his role and/or job title; (b) the scope of his duties at the relevant time; (c) whether or not Witlouw was furthering the respondent's interests at the relevant time(s); and/or (d) the precise manner in which Witlouw acted in the course and scope of his employment.

[46] Further complaints under this ground are that the applicant failed to plead whether or not there was any legal duty on the respondent towards her and what such duty entailed, and that absent from the pleading is any allegation that Witlouw acted with the intention to cause the applicant harm. Accordingly, so the respondent asserts, the applicant has failed to plead facts sufficient to establish a cause of action against the respondent, or a causal *nexus* between the respondent and Witlouw's conduct.

[47] The respondent fails to appreciate the distinction between *facta probanda* (the facts that must be proved) and *facta probantia* (the facts that would prove those facts). Put differently, facts, and not evidence, are what must be

pleaded. As was held in *McKenzie v Farmers' Co-Operative Meat Industries Limited*[6] a *'cause of action'* constitutes:

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

[48] The complaints referred to in paragraph [45] of this judgment as (a) – (d) are all *facta probantia* on the pleading as it stands. For example, it is pleaded that Witlouw conducted the interview in question while acting in the course and scope of his employment. Accordingly, logic dictates that the scope of his duties at the time involved him conducting the interview.

[49] The assertion that the pleading is excipiable because the applicant failed to allege that Witlouw acted with the intention to harm her during the alleged assault is self-evidently preposterous.

[50] As far as the failure to plead a legal duty on the part of the respondent is concerned, it has misunderstood the legal position. It is well established that an employer is liable for damage occasioned by delicts committed by an employee in the course and scope of the employee's employment.[7] In Neethling et al: *Law of Delict*[8] the position is summarised as follows:

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6 1922 AD 16 at 23, consistently applied ever since.
7 See *inter alia K v Minister of Safety and Security* 2005 (3) SA 179 (SCA); *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC).
8 7ed at 389-390.

> *'Vicarious liability may in general terms be described as the strict liability of one person for the delict of another. The former is thus indirectly or vicariously liable for the damage caused by the latter. This liability applies where there is a particular relationship between two persons…*
>
> *Where an employee (servant) acting within the scope of his employment, commits a delict, his employer (master) is fully liable for the damage. Fault is not required on the part of the employer, and therefore this is a form of strict liability…'*

[51] I deal with the fifth and sixth grounds together. The fifth ground relates to paragraph 6 of the pleading, where it is alleged that during Witlouw's disciplinary hearing held by the respondent after the alleged assault, Witlouw subjected the applicant to *'gruelling cross-examination'*, but that she has failed to plead facts to demonstrate that this was wrongful or unlawful. Accordingly, it is contended, the applicant has failed to establish a cause of action against the respondent, alternatively the pleading is vague and embarrassing.

[52] The sixth ground is in similar vein and pertains to paragraphs 8 and 9 of the pleading. At paragraph 8 the applicant alleges that as a consequence of the alleged sexual assault perpetrated against her; the subsequent disciplinary hearing; the criminal proceedings; and the impact that all of these events have had upon her, she has suffered *'psychiatric injuries'* and has been diagnosed with certain psychiatric conditions. At paragraph 9, the applicant alleges that as a consequence of those injuries, she has endured and will continue to endure certain *'conditions'*.

[53] The complaint is that the applicant has not pleaded any allegations to demonstrate that the disciplinary hearing and criminal proceedings were wrongful or unlawful. Accordingly, so it is asserted, her cause of action in relation to the disciplinary hearing and criminal proceedings is bad in law. Moreover, the respondent contends that the applicant has failed to aver facts to establish a causal *nexus* between it and the disciplinary hearing and criminal proceedings *'or any basis whatsoever as to why the second defendant is vicariously liable for the disciplinary hearing and criminal proceedings'.*

[54] The short answer to all of this is what I have found in relation to the second ground of complaint, and I will not repeat it.

Conclusion

[55] The applicant has been substantially successful in both matters before me (save for the relief sought to declare her notice of bar a regular step) and costs should thus follow the result.

[56] As far as the scale thereof is concerned, and while it appears clear that the respondent has been obstructive, even going so far as to threaten the applicant's attorney with an entirely unwarranted *de bonis propriis* costs order, I am nonetheless of the view that an award against the respondent on the attorney and client scale, as sought by the applicant, is not appropriate.

[57] This is because the issues which required determination in relation to the currently worded rule 23(1) were not simple, and the applicant herself took an irregular step by delivering the notice of bar.

[58] Because the respondent did not pursue its rule 30 remedies in that regard, the notice of bar stands until set aside. If I do not invoke the court's inherent power under s 173 of the Constitution, the procedural muddle which has unfolded in this litigation thus far will in all probability be perpetuated. This cannot be in either party's interest, and there can also be no question of prejudice to either if the notice of bar is set aside by this court.

[59] **The following order is made:**

1. **The exception delivered by the respondent (second defendant) on 20 May 2021 is set aside as an irregular step in terms of uniform rule 30;**
2. **The notice of bar delivered by the applicant (plaintiff) on 21 May 2021 is set aside;**
3. **The exception delivered by the respondent (second defendant) on 1 April 2021 is dismissed;**
4. **The respondent (second defendant) shall deliver its plea to the amended particulars of claim of the applicant (plaintiff) within 20 (twenty) court days from date of this order, failing which the applicant (plaintiff) may deliver a notice of bar in accordance with uniform rule 26; and**

5. **The respondent (second defendant) shall pay the costs of both the rule 30 application and the exception (of 1 April 2021) on the scale as between party and party as taxed or agreed, including any reserved costs orders.**

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J I CLOETE