REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON EXCEPTION

Case no: HC-MD-CIV-ACT-DEL-2020/03938

In the matter between:

SAARA KAMBUZE **1ST PLAINTIFF**

KRISTOF NAMUKWAMBI **2ND PLAINTIFF**

and

SHILIMELA ADVANCED SECURITY SERVICES CC **DEFENDANT**

Neutral citation: *Kambuze v Shilimela Advanced Security Services CC* (HC-MD-CIV-ACT-DEL-2020/03938) [2021] NAHCMD 90 (02 March 2021)

Coram: SIBEYA J
Heard: **11 February 2021**
Delivered: **02 March 2021**

Flynote: Practice – Exception – On the premise that the particulars of claim lack the necessary averments to sustain a cause of action and are vague and embarrassing – Principles thereto reiterated – Court predominantly holding the view that it will defeat the established principle of vicarious liability if employers are allowed to escape liability just because the names of a particular employee are not stated in the particulars of claim.

Summary: The plaintiffs' instituted summons against the defendant where they claim damages based on delict after being shot and injured by security guards employed by the defendant. The defendant raised an exception on one ground, that considering that the plaintiffs' claims against the defendant are predicated on the principle of vicarious liability, failure to reveal the names of the said security guards in the particulars of claim is fatal and dispositive of the plaintiffs' claims. Out of choice, the plaintiffs did not amend the particulars of claim but opposed the exception. At the heart of this matter, therefore is the determination whether the particulars of claim can sustain the plaintiffs' claims based on vicarious liability and whether the particulars of claim are vague and embarrassing.

Held – The employer may be held liable for actions of the employee irrespective of how bad, dishonest or negligent the employee acts, provided that this is carried out within the course and scope of employment.

Held – Failure to name the employee does not render the particulars of claim expiable. Parties may institute claims against the employers based on vicarious liability without necessarily stating the names of the employees, provided that it is apparent from the pleadings that such persons are not employees of the defendants. Instances may occur where the name of the employee is unknown to the claimant but where the identity of the employer is clear as noon and day. It will defeat the ancient established principle of vicarious liability if employers are allowed to escape liability just because the names of a particular employee are not stated and will in my view amount to a travesty of justice.

ORDER

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1. The defendant's exception brought against the plaintiffs' particulars of claim is dismissed with costs.
2. Costs of opposing the exception is subject to rule 32(11).
3. The matter is postponed to 16 March 2021 at 14:00 for a case planning conference.
4. The parties must file a joint case plan on or before 11 March 2021.

JUDGMENT

SIBEYA J:

Introduction

[1] This is an exception directed at pouring cold water on the threatening damages claims by the plaintiffs arising from incidents where security guards allegedly employed by the defendant shot and injured the plaintiffs in the course and scope of employment. Aimed at paralyzing the claims, the defendant banks on one ground, that considering that the plaintiffs' claims against the defendant are predicated on the principle of vicarious liability, failure to reveal the names of the said security guards in the particulars of claim is fatal and dispositive of the plaintiffs' claims.

[2] The defendant further argues in the alternative that the averments in the particulars of claim are vague and embarrassing.

[3] Out of choice, the plaintiffs did not amend the particulars of claim but opposed the exception.

[4] At the heart of this matter therefore is the determination whether the particulars of claim can sustain the plaintiffs' claims based on vicarious liability and whether the particulars of claim are vague and embarrassing.

[5] The first plaintiff claims:

a) an amount of N$750 000 (made out of a claim for pain and suffering (past and future) – N$100 000; past and future medical expenses – N$400 000; loss of amenities of life and disfigurement – N$100 000 and loss of income (past & future) – N$150 000);
b) Interest of 20% from date of judgment to date of final payment;
c) Costs of suit.

[6] The second plaintiff claims:

a) an amount of N$1 500 000 (made out of a claim for pain and suffering (past and future) – N$300 000; past and future medical expenses – N$700 000; loss of amenities of life and disfigurement – N$200 000 and loss of income (past & future) – N$300 000);
b) Interest of 20% from date of judgment to date of final payment;
c) Costs of suit.

The parties

[7] The first plaintiff is Saara Kambuze, an adult female residing at Erf 10211, Saima Hamunyela Street, single Quarters, Katutura in Windhoek.

[8] The second plaintiff is Kristof Namukwami, an adult female residing at Erf 10228, Saima Hamunyela Street, single Quarters, Katutura in Windhoek.

[9] The defendant is Shilimela Advanced Security Services CC, a close corporation duly registered and incorporated as such in terms of the applicable laws with its registered address situated at Erf 4540, Mweshipandeka Street in Ongwediva.

Representatives

[10] Mr Muluti appears for the plaintiffs while Mr. Brendell acts for the defendant.

Background

[11] In September 2020, the plaintiffs instituted summons against the defendant where they claim damages based on delict after being shot and injured by security guards employed by the defendant.

[12] The plaintiffs' claims are directed at the defendant for injuries sustained as a result of the gun shots fired on 27 September 2017 at around 19:00 by security

guards in the employ of the defendant, at or near Small Shop at Uukwamatsi Bar in Vickie Iipinge Street, Single Quarters, Katutura in Windhoek.

[13] The parties agreed to have the actions of the plaintiffs consolidated and dealt with as one. The court endorsed the said agreement premised on the close proximity in time, space and parties involved and consolidated the two actions as one under the present case number.

[14] The defendant filed a notice to raise an exception to the plaintiffs' particulars of claim in keeping with rule 57(2). The plaintiffs did not respond thereto. The defendant proceeded with its exception. The parties filed heads of argument and were ready to argue the exception on 11 February 2021. Some of the documents filed by both parties were filed out of time but in the interest of speedy resolution of the real issues in dispute in an efficient and cost-effective manner, this court opted to condone such late filing in order to get to the heart of the matter.[1]

The law

[15] Rule 57(1) regulates exceptions and it provides that:

'Where a pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or a defence, the opposing party may deliver an exception thereto within the period allowed for the purpose in the case plan order or in the absence of provision for such period, within such time as directed by the managing judge or the court for such purpose on directions in terms of rule 32(4) being sought by the party wishing to except.'

[1] Rule 1(3).

[16] The Supreme Court of South Africa in *Telematrix (Pty) Ltd t/a Telematrix Vehicle Tracking v Advertising Standard Authority*[2] discussed exceptions. Harms JA writing for the court stated the following:

[17] The Supreme Court in *Van Straten v Namibia Financial Institutions Supervisory Authority & another,*[3] per Smuts JA at para 18 set out the legal principles applicable to exceptions to pleadings on the ground that they lack averments necessary to sustain a cause of action and sated as follows:

> 'Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as correct. In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.'

[18] Placing reliance on rule 57(1), the defendant who bears the onus of proving that the pleading is expiable[4] excepted to the plaintiffs' particulars of claim on the grounds that they lack averments necessary to sustain a cause of action. As alluded to above, the defendant premised his exception on the failure by the plaintiffs to name the security guards who shot at them. Mr. Brendell argued that such failure meant that the defendant could not establish if such security guards were its employees or not, which could trigger the employment relationship between the defendant and the security guards and ultimately the extent of the liability of the defendant.

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[2] *Telematrix (Pty) Ltd Ltd t/a Telematrix Vehicle Tracking v Advertising Standard Authority* 2006 (1) SA 461 (SCA).

[3] *Van Straten v Namibia Financial Institutions Supervisory Authority & another* 2016 (3) NR 747 (SC).

[4] *Kotsopoulus v Bilardi* 1970 (2) SA 391 (C) at 395D.

[19] Mr. Brendell implored on the court to distinguish between public institutions like the police as opposed to private institutions which are factually similarly placed as the defendant. Mr. Brendell conceded during oral arguments that one may institute proceedings against the head of the police on the basis of vicarious liability without necessarily naming the exact errant police officers who caused damages to another causing damages, injuries or harm. He rested his argument with emphasis that where no names of the security guards are mentioned, no cause of action can be sustained against a private institution.

[20] Mr. Brendell cited *Sadok v Eagle Night watch Security CC*[5] for the contention that for plaintiffs to establish a cause of action against the defendant based vicarious liability. He submitted the *Sadok* matter required that the names of a security officer must be set out in the particulars of claim for the determination of the existence of the employer and employee relationship. Mr. Brendell drove his point home by stating that the plaintiffs' particulars of claim offend rule 45(5) and are further vague and embarrassing for not specifying the names of the guards and thus prejudicial to the defendant.

[21] Mr. Muluti did not take kindly to the above submissions made for the defendant and argued contrariwise that the exception is flawed and deserved to be rebuked by the court. Mr. Muluti further submitted that there is no requirement to provide the name of the security guard in the particulars of claim for a cause of action to be sustained. The name of the employee can be led in evidence therefore rendering the exception hopeless, so the argument went.

[22] At the outset, it should be stated that the parties are *ad idem* regarding the legal principles applicable to exceptions, and correctly so as referred to herein above. I shall therefore spare the court's labour to contentious issues.

[23] The parties however locked horns on the applicability or otherwise of the principle of vicarious liability regarding an employer where the name of the employee is not stated in the particulars of claim. It is therefore incumbent on this court to determine as to who from the aforesaid protagonists is correct in law.

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[5] *Sadok v Eagle Night watch Security CC* (I2642/2015) [2018] NAHCMD 18 (08 February 2018).

Vicarious liability

[24] It is settled law that for the principle of vicarious liability to be invoked as the basis for damages claim, it should be established that:

a) there was an employer-employee relationship;
b) the employee committed a delict; and
c) the employee acted within the scope of his or her employment during the commission of the delict.

[25] Scott JA in *K v Minister of Safety and Security*[6] succinctly set out the principle of vicarious liability as follows:

> 'The legal principles underlying vicarious responsibility are well-established. An employer, whether a Minister of State or otherwise, will be vicariously liable for the delict of an employee if the delict is committed by the employee in the course and scope of his or her employment. Difficulty frequently arises in the application of the rule, particularly in so-called 'deviation' cases. But the test, commonly referred to as the 'standard test', has been repeatedly applied by this Court. Where there is a deviation the enquiry, in short, is whether the deviation was of such a degree that it can be said that in doing what he or she did the employee was still exercising the functions to which he or she was appointed or was still carrying out some instruction of his or her employer. If the answer is yes, the employer will be liable no matter how badly or dishonestly or negligently those functions or instructions were being exercised by the employee. Notwithstanding the difficult questions of fact that frequently arise in the application of the test, it has been recognised by this Court as serving to maintain a balance between imputing liability without fault (which runs counter to general legal principles) and the need to make amends to an injured person who might otherwise not be recompensed. From the innocent employer's point of view, the greater the deviation the less justification there can be for holding him or her liable.'

[26] Notwithstanding the perceived unfairness associated with holding an employer vicariously liable for the actions of the employee and the need to restore an injured person to his previous position who may not be compensated, it is an established principle of law that the employer can be held liable for actions of the employee committed during the course and scope of employment. The employer may be held

[6] *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA) 183C-G.

liable for actions of the employee irrespective of how bad, dishonest or negligent the employee acts, provided that this is carried out within the course and scope of employment.

[27] Considering that at this stage the court is seized with the determination of the veraciousness or otherwise of the exception, the facts are regarded as correct. It follows therefore that the court is duty bound to determine whether the following averments (regarded as correct) can sustain a cause of action:

a) That on 27 September 2017 at or near Small Shop at Uukwamatsi Bar in Windhoek the security guards employed by the defendant assaulted, shot and injured the plaintiffs;
b) That as a result of the injuries sustained, the plaintiffs suffered damages made up of pain and suffering; past and future medical expenses; loss of amenities of life and loss of income quantified in the particulars of claim;
c) That at all times, the security guards were acting within the course and scope of their employment or within the risk created by such employment.

[28] The above averments should be assessed at the backdrop of the qualm of the defendant that the names of the security guards are not set out in particulars of claim. Does the failure to name the security officers render the particulars of claims excipiable?

[29] In a related matter, a claim based on delict was instituted against a security company. The claim resulted from an event where an armed security guard shot at another person, causing him severe injuries which let to paralysis. A year after the incident, the security guard left the employ of the security company and before the trial could commence, the security guard died of natural causes. The security company was sued on the ground of vicarious liability in the absence of the deceased security guard. The security company disputed its liability for the damages claim instituted but the High Court had none of that. The High Court upheld the claim. Perturbed by the decision of the High Court, the security company appealed to the Supreme Court against the finding that it was vicariously liable for the actions of the security guard.

[30] While entertaining the appeal, Smuts JA writing for the Supreme Court in *Crown Security CC v Gabrielsen* discussed the principle of vicarious liability and stated as follows at para 17 - 18:[7]

'[17] O'Regan J, thereafter referred with approval to a later leading case of *Minister of Police v Rabie.*[8] In that matter, a plaintiff claimed damages for *inter alia* wrongful arrest and detention effected by a mechanic employed by the police pursuing his own personal interests. He was off duty at the time of the arrest and not in uniform. But he identified himself as a policeman to the victim and took him to a police station, filled in a docket and wrongfully charged him. This was a significant deviation from the usual tasks incidental to his employment with the police. The issue was whether the Minister of Police was vicariously liable for damages arising from his delictual conduct of the off duty police employee. The court found that the Minister was liable. The test for determining vicarious liability in that matter was formulated in the following way:

> "It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (cf *Estate van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.[9]"

[31] This approach, which has since been repeatedly applied,[10] was further explained by O'Regan J in *K v Minister of Safety and Security*[11] in the context of the adoption of the Constitution of South Africa and in the light of the values expressed in it:

'The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question

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[7] Supreme Court in *Crown Security CC v Gabrielsen* (SA 40/2013) [2015] NASC 14 (08 July 2015).
[8] *Minister of Police v Rabie* 1986 (1) SA 117 (A).
[9] *Supra* at 134C-E.
[10] *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* 2002 (5) SA 649 (A) para 11; *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK* 2002 (5) SA 475 (SCA) para 10; *Absa Bank v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) per Zulman JA para 5; although *Rabie* was criticised in *Ngobo* at 832, this statement for the test was not directly criticized.
[11] *Supra* at para 32.

requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is "sufficiently close" to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.'

[32] Having regard to the above authorities, the Supreme Court concluded that the security company was vicariously liable for the actions of the security guard and dismissed the appeal.

[33] In *casu* the bar is raised high, as the excipient must satisfy the court that notwithstanding the acceptance of the averments in the pleadings as correct, no cause of action can be sustained on the particulars of claim. The standard has been clarified to provide that the excipient should prove to the court that on every interpretation of the particulars of claim, no cause of action is disclosed.[12]

[34] In the present matter, the security guards are identified as employees of the defendant acting within the course and scope of their duties. There are several matters and indeed our jurisdiction has embraced the approach that an employer may be found to be vicariously liable for the actions of the employee, even where the delinquent employee is not joined to the suit.[13] It must also be mentioned that the reliance by Mr. Brendell on the *Sadok* matter as authority for the proposition that the names of the security guard must be set out in the particulars of claim in order to sustain a course of action is unfortunate and misleading. In the *Sadok* matter, the identity of the security guard who was at the center of the claim was known and the identity of the guard was not an issue.

[35] It is a common occurrence in our courts that actions are instituted against the employers for actions of their employees without citing the employees. When Mr.

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[12] *Denker v Cosak and Others* 2006 (1) NR 370 (HC) 373H.

[13] *Crown Security CC v Gabrielsen* (supra).

Brendell was alerted to this position, he was fixed, never to surrender and developed another thought on his feet and conceded only to the extent that actions where the employee is not named in the particulars of claim is only applicable to claims against public institutions. He provided no authority for such bizarre proposition.

[36] I hold without fear of contradiction that failure to name the employee does not render the particulars of claim expiable. I am further of the respective view that the attempt by Mr. Brendell to limit the none requirement to name the employee to public institutions only lacks reason, logic and is ultimately misplaced. I find that parties may institute claims against the employers based on vicarious liability without necessarily stating the names of the employees, provided that it is apparent from the pleadings that such persons are not employees of the defendants. Instances may occur where the name of the employee is unknown to the claimant but where the identity of the employer is clear as noon and day. It will defeat the ancient established principle of vicarious liability if employers are allowed to escape liability just because the names of a particular employee are not stated and will in my view amount to a travesty of justice.

[37] I am not satisfied upon a closer scrutiny that on every interpretation of the particulars of claim, no cause of action can be sustained. The failure to mention the names of the security guards in the employ of the defendant does not render the particulars of claim excipiable. This ground of exception on which an attack to the particulars of claim is premised falls to be dismissed.

Vague and embarrassing

[38] The defendant had another arsenal in its string. It contented that the plaintiff's particulars of claim are vague and embarrassing and falls short of compliance with rule 45(5). This ground was aimed at the particulars of claim in its totality. Rule 45(5) requires that every pleading (particulars of claim not spared) must contain clear and concise facts on which the claim is based.

[39] Parker AJ in *Jacobs v The Minister of Safety and Security*[14] stated as follows at para 12 while discussing exceptions:

'Where a statement is vague it is either meaningless or capable of more than one meaning. (Wilson v South African Railways and Harbours 1981 (3) SA 1016 (C) at 1018H) And exception involves a two-fold consideration, that is: (a) whether the pleading complained of lacks particularity to the extent that it is vague, and (b) whether the vagueness is of such nature that the excipient is prejudiced. (Trope v SA Reserve Bank and Two Other Cases). Where the court finds that the pleading is not vague, the second consideration does not arise.'

[40] The court in *Trustco Capital (Pty) Ltd v Atlanta Cinema CC and Others*[15] expanded the legal principles applicable to exceptions to pleadings on the basis of being vague and embarrassing to the following:

'[16] A pleading may disclose a cause of action or defence but may be worded in such a way that the opposite party is prevented from clearly understanding the case he or she is called upon to meet. In such a case the pleading may be attacked on the ground that it is vague and embarrassing. A man who has an excipiable cause of action is in the same position as one who has no cause of action at all.

In any case an exception on the ground that the pleading is vague and embarrassing will not normally be upheld unless it is clear that the opposite party would be prejudiced in his defence or action as the case might be.

In the first place when a question of insufficient particularity is raised on exception the excipient undertakes the burden of satisfying the court that the declaration, as it stands, does not state the nature, extent and the grounds of the cause of action. In other words he must make out a case of embarrassment by reference to the pleadings alone … If an exception on the ground that certain allegations are vague and embarrassing is to succeed, then it must be shown that the defendant, at any rate for the purposes of his plea, is substantially embarrassed by the vagueness or lack of particularity.'

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[14] *Jacobs v The Minister of Safety and Security* (I 3772/2013) [2015] NAHCMD 27 (19 February 2015) at para 12, p 7.
[15] *Trustco Capital (Pty) Ltd v Atlanta Cinema CC and Others* (P) I 3268-2010) [2012] NAHC 190 (12 July 2012), p 8.

[41] Having set out the legal principles applicable to exceptions based on the ground that the particulars of claim are vague and embarrassing, it is now apposite to apply such law to the facts at hand. Notwithstanding the fact that the defendant attacked the particulars of claim with an exception from two angles, being failure to sustain a cause of action and vague and embarrassing, the underlying qualm is one. Literally the defendant launched a double barrel approach based on a single position. As alluded to above, it is that the plaintiffs failed to name the security guards in question and this resulted in the plaintiffs' particulars of claim showing no cause of action and rendering the particulars of claim vague and embarrassing.

[42] In view of my finding earlier that the failure to name the security guard does not create a deficiency in the particulars of claim rendering same not capable to sustain a cause of action, such finding collapses the reliance on the same complaint but for a different approach. Mr. Brendell's argument that failure to name the security guard rendered the particulars of claim vague and embarrassing when such complaint is already found to be meritless *(supra)* is tantamount to flogging a dead horse.

[43] This court is of the view that a consideration of the particulars of claim reveal that the defendant can make out the nature of the allegations made against it and can meet such allegations. As a result, it follows that I am not satisfied that the particulars of claim are vague and embarrassing.

Conclusion

[44] In the premises, I am of the considered view that the exception was not properly taken and falls to be dismissed.

[45] In the result, it is ordered that:

1. The defendant's exception brought against the plaintiffs' particulars of claim is dismissed with costs.
2. Costs of opposing the exception is subject to rule 32(11).

3. The matter is postponed to 16 March 2021 at 14:00 for a case planning conference.
4. The parties must file a joint case plan on or before 11 March 2021.

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O S Sibeya

Judge

APPEARANCES

PLAINTIFFS:	P Muluti Of Muluti & Partners Legal Practitioners Windhoek
DEFENDANT:	A Brendell Of Kishi Shakumu & Co Inc Windhoek