IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: **1705/2021**

In the matter between:

R O C H E L L E M A R Y R E N S B U R G

1st Excipient

C L I N T O N K U B I E

2nd Excipient

and

D R J B F C I L L I E R S

Respondent

In *re*:

Case no: **1705/2021**

In the matter between:

R O C H E L L E M A R Y R E N S B U R G

1st Plaintiff

C L I N T O N K U B I E

2nd Plaintiff

and

D R J B F C I L L I E R S

Defendant

CORAM: JP DAFFUE J

HEARD ON: 17 MAY 2024

DELIVERED ON: 20 SEPTEMBER 2024

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 20 SEPTEMBER 2024.

Introduction

[1] An obstetrician and gynaecologist is the defendant in an action instituted by the plaintiffs. They claim patrimonial loss arising from their duty to support their minor child. It is their case that the child was born consequent upon the defendant's failure to carry out a sterilisation procedure on the first plaintiff.

[2] The defendant filed a special plea, relying on prescription. The plaintiffs filed an exception to the special plea which is opposed.

The parties

[3] The first plaintiff in the main action and the first excipient in the exception proceedings is Ms Rochelle Mary Rensburg. The second plaintiff and second excipient is Mr Clinton Kubie. They are resident in Bloemfontein and are represented by Adv A Rossouw SC.

[4] The defendant in the main action and respondent in the exception proceedings is Dr JBF Cilliers with his principal place of business at the Mediclinic, Bloemfontein. He is represented by Adv ST Farrell SC.

[5] In order to prevent confusion, I shall refer to the parties as in the main action.

The pleadings in a nutshell

[6] The plaintiffs issued summons against the defendant, claiming damages in the amount of R5 million, being their alleged joint loss of patrimony in respect of, or associated with, the support of their minor child born on 29 May 2018. Their claim is based on alleged breach of contract, alternatively delict. The defendant filed a special plea, relying on extinctive prescription. He also pleaded over on the merits. The plaintiffs did not replicate, but filed an exception to the special plea. They seek dismissal of the special plea with costs.

Relevant factual background as pleaded in the special plea

[7] The following is a factual background, bearing in mind the facts pleaded in the special plea:

a. the plaintiffs' action is for the recovery of damage, being their alleged joint loss of patrimony in the sum of R5 million in respect of, or associated with, the support of the child;

b. the plaintiffs' 'debt' as the term is intended by, interpreted, and applied in s 12(1) of the Prescription Act 68 of 1969 is pure economic loss arising from the first plaintiff's alleged wrongful pregnancy with her child;

c. the plaintiffs allege that the debt arose from the defendant's failure to perform a sterilisation procedure on the first plaintiff on 22 January 2016, this constituting a breach of the agreement between the parties and/or a wrongful and negligent breach of the defendant's duty of care;

d. the defendant's alleged breach, whether the cause of action is one in contract, or in delict, or in both contract and delict, constitutes a single wrongful act for purposes of s 12(1) of the Prescription Act and 'debt' in terms of that same subsection;

e. the plaintiffs' debt became due in terms of s 12 of the Prescription Act on the date of the alleged breach of contract, being 22 January 2016, on which date the prospective patrimonial damage was likely to eventuate, alternatively on the date on which the child was conceived on which date damage was in fact incurred in that the plaintiffs' *damnum* was thereby affected; alternatively, on the date that either or both the plaintiffs actually incurred any expenses, costs and/or patrimonial loss in relation to the diagnosis, management and/or care associated with, arising from, or in any way related to the first plaintiff's pregnancy;

f. in the premises the plaintiffs' debt became due on 22 January 2016,

alternatively the approximate date on which the plaintiff conceived the child, or further in the alternative the dates on which the expenses referred to above were actually incurred;

g. on 30 January 2018 the plaintiffs confronted the defendant and alleged that he had failed to perform a sterilisation procedure on the first plaintiff on 22 January 2016 and consequently, by no later than 30 January 2018, the plaintiff's debt became due in terms of s 12(1) of the Prescription Act by which date they had already incurred expenses pertaining to the child conceived and had knowledge of the identity of the defendant as their debtor and the facts from which their alleged debt arose as is required by and contemplated in the deeming provisions of s 12(3) of the Prescription Act;

h. the plaintiffs served their summons and particulars of claim to claim payment of the debt on 16 April 2021, thus more than three years after the debt had arisen, alternatively more than three years after 30 January 2018;

i. the debt is a debt as described in s 11(d) of the Prescription Act which has a prescription period of three years and consequently, the plaintiffs' claim against the defendant has prescribed.

The exception

[8] In seeking dismissal of the defendant's special plea with costs, the plaintiffs rely *inter alia* on the following in their exception filed on 18 January 2023 in terms of rule 23 of the Uniform Rules of Court:

'3. [A] 'debt' as envisaged in the Act means an obligation to pay money, deliver goods or render services.

4. Prior to the birth of the child the defendant had no legal obligation to pay anything towards the plaintiffs' child-raising expenses, because the minor was still a foetus.

5. But for the birth of the minor child, the plaintiffs suffered no contractual and/or delictual damages.

6. The plaintiffs' duty to maintain arose on the date the child was born.

7. The defendant's special plea contains no averment as to when the minor was born, *ie* the date on which the debt arose.

8. In the premises the defendant's special plea is bad in law in that it lacks the aforesaid necessary averment to sustain his special defence.'

Principles pertaining to exception

[9] It is trite that a charitable test is applied in adjudicating an exception. The excipient must prove that the pleading is excipiable on every interpretation that can reasonably be attached to it, or put otherwise, that where a plea is the subject of exception, that no defence has been made out on all possible readings of the facts pleaded. Harms JA put it as follows in *Telematrix (Pty) Ltd v Advertising Standards Authority SA (Telematrix):*

'[3] Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that 'cuts through the tissue of which the exception is compounded and exposes its vulnerability'.

[10] In *H v Fetal Assessment Centre* Froneman J cited Harms JA's aforesaid *dictum* with approval, stating that:

'[10] In the high court the matter was decided on exception. Exceptions provide a useful mechanism 'to weed out cases without legal merit', as Harms JA said in *Telematrix*. The test on exception is whether on all possible readings of the facts no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.'

The learned justice proceeded as follows:

'[12] There is no general rule that issues relating to the development of the common law cannot be decided on exception, but where the 'factual situation is complex and the legal position uncertain' it will normally be better not to do so.'

The judgment continued as follows:

[78] The particulars of claim and the exception based on it do not traverse an essential part of determining whether a child's claim may exist, namely the constitutional injunction that a child's best interests are of paramount importance in any matter concerning the child. Determining that involves both factual and legal considerations, matters not capable of being decided appropriately on exception. This was not the proper procedure to determine the important factual, legal and policy issues that may have a decisive bearing on whether the common law should be developed to allow the child's claim to be accommodated in the particular circumstances of this case.

[79] In upholding the exception, the high court also ordered the dismissal of the claim. This was unwarranted. The upholding of an exception does not inevitably carry with it the dismissal of the action. Leave to amend the particulars of claim should have been granted.' (emphasis added)

[11] In *Pretorius and Another v Transport Pension Fund and Another* the Constitutional Court reiterated the trite principles in the following words:

'[15] In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.' (footnotes omitted)

[12] It is abundantly clear that in order to consider an exception, the court should accept all allegations of fact pleaded by the party as true and correct, unless they are manifestly false. It should not go beyond the allegations and may not have regard to any other extraneous facts or documents. If the exception does not serve to weed out a case or defence without legal merit, it shall not be upheld. More recently, Ponnan JA summarised the trite principles relevant to exceptions in *Tembani and Others v President of the Republic of South Africa and Another* (*Tembani*) as follows*:*

'Whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law, in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out, it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.' (footnotes omitted)

[13] Although the learned justice referred to a particulars of claim in *Tembani*, the same applies in my view to the adjudication of an exception filed in respect of a plea as *in casu*.

[14] The plaintiffs pray that the special plea should be dismissed with costs. Even if successful, such order is not the appropriate order to be made. If the pleading is

found to be excipiable, leave should as a general principle, be granted to the defendant to file an amended plea, if so advised. Heher JA made this abundantly clear in *Constantaras v BCE Foodservice Equipment (Pty) Ltd* in the following words:

'In an *obiter dictum* in *Princeps (Edms) Bpk en 'n Ander v Van Heerden NO en Andere* 1991 (3) SA 842 (T) at 845 Harms J said that in the Supreme Court an unsuccessful pleader is given the opportunity to amend his so-called plea, even when that plea has been set aside because it does not disclose a defence. The *rationale* seems to be that although the defence contained in the pleading may be bad the pleading as such continues to exist. In the *Group Five Building* case (at 603F-H) Corbett CJ quoted with approval from *Johannesburg Municipality v Kerr* 1915 WLD 35 at 37 in which Bristowe J said that although the quashing of an entire declaration on exception means that it is an absolute bar to any relief being obtained on it, that 'does not take the declaration off the file or place the case in the same position as though no declaration had been delivered'. Despite the distinctions between the effects of the striking down of a particulars of claim and a plea to which I have earlier referred, it seems to me that, in principle, fundamentally defective pleadings emanating from a plaintiff and defendant should be dealt with on an equal footing. Since the rule referred to above is firmly established in relation to the defective pleading of claims we should therefore apply it *mutatis mutandis* to the flawed pleading of defences. (emphasis added)

Evaluation of the parties' submissions and the relevant authorities

[15] Before I apply the principles pertaining to exceptions to the facts and consider the submissions of counsel in that regard, I deem it apposite to refer to authorities pertaining to prescription. In *Truter and Another v Deysel (Truter)* the plaintiff issued summons to claim damages arising from an injury allegedly sustained as a result of certain medical and surgical procedures. The question to be answered was whether the plaintiff had actual or deemed knowledge of the facts from which the debt has arisen prior to a certain date. The following *dictum* has been accepted to be a correct statement of the law in numerous judgments thereafter:

'I am of the view that the High Court erred in this finding. For the purposes of the Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.'

[16] The court continued in *Truter* that 'a plaintiff's cause of action is complete as

soon as some damage is suffered, not only in respect of the loss already sustained by him or her, but also in respect of all loss sustained later.' Consequently, the plaintiff's cause of action was complete and the debt became due as soon as the first harm was sustained by him 'notwithstanding the fact that the loss of his right eye occurred later.'

[17] It is also necessary to consider the 'once and for all rule.' In *Evins v Shield Insurance Co Ltd (Evins)* this rule was again confirmed. A plaintiff must as a general proposition claim all damages flowing from one cause of action, whether already sustained or prospective. This applies to damages due to breach of contract and delictual damages.

[18] The question for determination is whether the plaintiffs' debt fell due as contemplated in s 12(1) of the Prescription Act when the first plaintiff had already knowingly conceived the child and the plaintiffs had already incurred patrimonial losses associated with the unwanted pregnancy of the child as contended for by the defendant, or only when the child was eventually born of the unwanted pregnancy as contended for by the plaintiffs.

[19] Mr Farrell submitted that the eventual birth of the child was no more than the manifestation of a probable future loss which has arisen from an already due single debt. Any claim for damages sustained by the plaintiffs during the first plaintiff's pregnancy had already become prescribed when the action was instituted. He also emphasised the fundamental error in the plaintiffs' approach. The birth of the child is not the wrongful act, unlike as submitted on behalf of the plaintiffs. The claim cannot be equated with the widow's claim in *Evins* due to the death of her husband, the breadwinner. Having regard to the authorities quoted herein, I agree with this submission.

[20] Mr Rossouw submitted that, based on the analogy of the breadwinner's death and the widow's right to claim damages for loss of maintenance at that stage only, relying on *Evins,* the debt in this instance arose when the child was born alive. According to him there cannot be any wrongful act if summons is issued before the birth of the child. This submission misses the point. Firstly, nobody has suggested

that the plaintiffs should have instituted action before the birth of the child. Secondly, the plaintiffs would at all times be entitled to claim when the debt became due as pleaded in the special plea. In any of these instances they would be entitled to claim damages already sustained, or prospective, in one cause of action. He also submitted that the plaintiffs' claim had arisen only when all the material facts which must be proved in order to enable the plaintiffs to sue – the *facta probanda* – were present, relying again and in particular on *Evins.* He submitted that the defendant appeared to have adopted a 'single cause of action' theory as opposed to the *facta probanda* approach, whereas the aforesaid theory was rejected by the court in *Evins.* I do not agree with Mr Rossouw's submissions for the reasons mentioned herein.

[21] Mr Rossouw submitted further that prior to the birth of the child the plaintiffs had no legal duty to maintain the child and consequently, the defendant had no legal obligation to pay anything towards the plaintiffs' child-raising expenses. A foetus is not vested with subjective rights as it was not yet a natural person. In this regard he *inter alia* relied on *Road Accident Fund v Mtati (Mtati*). His reliance on the *Mtati* judgment is wrong. It does not support his submission. In that case the Supreme Court of Appeal had to decide when the right of a child accrued to sue for his prenatal injuries. It held that the right of action became complete only after the child was born alive. *In casu,* it is not the child who instituted action for prenatal injuries, but the parents who claim damages in the form of a loss of their joint patrimony in respect of the maintenance of the child. Clearly, the plaintiffs had incurred patrimonial losses before the birth of child. This court must accept, based on the authorities quoted earlier, that the facts pleaded in the special plea are the truth. Therefore, by the time that plaintiffs visited the defendant on 30 January 2018, the child was already conceived and at best for the plaintiffs' prospective patrimonial damages were likely to eventuate. The mere fact that the plaintiffs decided not to claim any damages incurred prior to the birth of the child is insufficient for a finding that the exception should be upheld. In any event, the costs of maintenance were reasonably foreseeable damages which should have been claimed timeously. At best for the plaintiffs, they were fully appraised of all relevant facts by 30 January 2018 and should have instituted action within three years from this date.

[22] In *Administrator, Natal v Edouard* the plaintiff claimed for 'wrongful conception'

based on breach of contract. The claim for the costs of maintenance of the child was upheld. Although the principle to be entitled to claim for damages in the form of maintenance obligations because of unwanted birth was adopted in that case, the judgment is not authority in support of the plaintiffs' exception *in casu.*

[23] In *Mukheiber v Raath and another* the plaintiffs claimed compensation for the confinement costs of the wife and maintenance of the child. Their claim, based on delict, was initially dismissed by a single judge in the High Court, but the full court reversed the judgment. The Supreme Court of Appeal agreed with the full court and dismissed the medical practitioner's appeal. Although the principle was set, the judgment does not assist the plaintiffs at this stage of the proceedings, being exception procedure. Mr Rossouw relied on paragraph 46 of this judgment for the submission that the plaintiffs had no legal duty to maintain prior to the birth of their child. This paragraph does not support the submission, but in any event, I have already dealt with prospective damages and the once and for all rule above. I reiterate that for purposes of adjudicating the exception, the court has to accept the facts stated in the special plea. It does not avail the plaintiffs to allege that their duty to maintain only arose on the date the child was born, to wit 29 May 2018. If that was indeed the case, the claim would not have become prescribed. Unfortunately, the authorities are against such a proposition.

[24] I am satisfied that the exception shall be dismissed. There is no reason why the general rule pertaining to costs shall not be applied. The defendant as the successful respondent at the exception stage is entitled to his costs.

[25] Consequently, the following order is issued:

1. The exception is dismissed with costs, including the costs of counsel on scale C.

JP DAFFUE J

On behalf of the excipients/plaintiffs:	Adv A Rossouw SC
Instructed by:	VZLR Inc c/o Du Plooy Attorneys

	BLOEMFONTEIN
On behalf of the respondent/defendant:	Adv ST Farrell SC
Instructed by:	MacRobert Inc c/o Neuhoff Attorneys BLOEMFONTEIN