

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 298/2023

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH, GAUTENG PROVINCE

APPELLANT

and

MARIE DE LANGE

RESPONDENT

Neutral citation: *MEC for Health, Gauteng v de Lange* (298/2023) [2024]
ZASCA 38 (03 April 2024)

Coram: GORVEN, MATOJANE and WEINER JJA and COPPIN and
SMITH AJJA

Heard: 04 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 3 April 2024.

Summary: Civil Procedure – claim for damages – separated issues – not clearly stated – stated case limiting separated issues – judgment on stated case limited to negligence causing death of deceased — stated not dealing with causation of damages arising from death – amendment of the particulars of claim to include a new head of damages – objection that evidence on new head should have been proved under stated case – no evidence led relating to any damages arising from death in stated case – no basis to object to amendment.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Collis J, sitting as a court of first instance.

The appeal is dismissed.

JUDGMENT

Matojane JA (Gorven and Weiner JJA and Coppin and Smith AJJA concurring):

[1] This is an appeal against the order of the Gauteng Division of the High Court, Pretoria (Collis J), granting the respondent leave to amend her particulars of claim with costs. The amendment sought to introduce a claim for damages for emotional shock caused by the death of the husband of the respondent. The appeal is before us with leave of this court (per Mbatha and Meyer JJA).

[2] Mr. Zacharias Johannes de Lange (deceased) passed away on 21 September 2015 at the Steve Biko Academic Hospital in Pretoria (SBPAH). Prior to being admitted, Mr. de Lange had sustained a blow to his head during a rugby match.

[3] Marie de Lange, the respondent herein and the wife of the deceased, issued summons against the appellant out of the Gauteng Division of the High Court, Pretoria (the trial court). She claimed that the negligence of hospital employees for whom the appellant was vicariously liable had wrongfully and negligently caused the death of the deceased. Arising from his death, she claimed that she had sustained damages by way of loss of past and future support for her and her two minor sons, D[...]l and D[...]n. She accordingly claimed payment of R500 000.00 as damages for her past and future loss of support and R600 000.00 and R800 000.00, respectively, on behalf of D[...]l and D[...]n for their past and future loss of support.

[4] The parties held a pre-trial conference. It was agreed between them that ‘the issues pertaining to liability/merits (negligence and causality) should be separated from the issues pertaining to the quantum of the plaintiff’s claim in terms of Uniform rule 33(4) and that the matter proceeds initially in respect of the aforesaid issues pertaining to liability only at the first trial.’

[5] Pursuant to that agreement, the parties prepared a stated case in terms of Uniform rule of Court 33(1). This was presented to the trial court (Rangata AJ). It is not clear whether the trial court granted an order in terms of rule 33(4) separating the issues at all, whether in the terms agreed in the pre-trial conference or simply that the issues set out in the stated case would be heard separately in terms of rule 33(4). It seems that the parties and the trial court

dealt with the stated case without an order separating the issues having been granted.

[6] In *Denel (Edms) Bpk v Vorster*,¹ Nugent JA emphasized the importance of the trial court clearly defining and delineating the specific issues to be tried. He stated that this should be explicitly set out in the court's orders to avoid any ambiguity or confusion between the parties. He stated that although terms like 'merits' and "quantum" may seem straightforward initially, their shared understanding often does not endure. Therefore, when making rulings under Uniform rule 33(4) and issuing orders, the trial court has a duty to circumscribe the trial issues with clarity and precision to prevent problems down the line. This the parties failed to do in setting out issues to be decided by the court.²

[7] Be that as it may, the stated case, after setting out medical facts extracted from the hospital records, set out the issues for adjudication as follows:

'26. The following are the conclusions of the plaintiff's experts in relation to the negligence of the employees of the defendant resulting in the cause of the death of the deceased.

27. The defendant has not presented any evidence of a factual or expert nature to contest or oppose the conclusions below, and the plaintiff submit that if the Court is satisfied, there is no reason in fact or law that would prevent this Honourable Court from making an order in accordance with the draft order.

...

34. Had the employees of the defendant treated the deceased appropriately, and not negligently, he would not have died.'

¹ *Denel (Edms) Bpk v Vorster* [2004] ZASCA 4; 2004 (4) SA 481 (SCA) para 3 (Denel).

² See also *Absa Bank Ltd v Bernert* [2010] ZASCA 36; 2011 (3) SA 74 (SCA) para 21 (Bernert); *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* 2018 (5) SA 300 (SCA) paras 9-11.

[8] After hearing argument, Rangata AJ granted an order, the material parts of which are:

‘Having heard argument for counsel for both parties based on the written stated case, it is ordered as follows:

1. The defendant is liable to the plaintiff for her 100% damages as proved or agreed in her personal capacity and in her representative capacity on behalf of her minor sons D[...]l d[...] L[...] and D[...]n d[...] L[...], arising from the death of the deceased, Zacharias Johannes de Lange who died at the Steve Biko Hospital on 21 September 2015. Quantum is postponed sine die.’

[9] On 17 August 2020, the respondent gave notice of its intention to amend the particulars of claim in terms of Uniform rule 28. In the proposed amendment, the respondent sought to insert claims for emotional shock and trauma allegedly suffered by herself and the two minor children due to the deceased’s death. She further sought to withdraw her personal claim for loss of support since she has remarried and was advised that she can no longer claim that support from the appellant. She further sought to reduce the claims for the two minor children based on expert reports and the deceased’s lifetime earnings. The new total was some R2.5 million and included general damages for emotional shock and trauma.

[10] The appellant objected to the proposed amendment. There were initially four bases of objection. The first contended that the respondent’s amended claim in her personal capacity for emotional shock and trauma would introduce a new cause of action which has been extinguished by prescription. The second was that the proposed amendment would cause prejudice to the appellant as the claims for emotional shock and trauma were not initially pleaded. The third was that, with respect to the children, against whom prescription could not be raised, the appellant had not had an opportunity to investigate the claims or seek a

medical opinion. Lastly, the appellant was concerned that if the amendment was allowed, the appellant could become liable to compensate the respondent and the minor children for emotional shock and trauma without the respondent first having established the appellant's liability when the liability for all claims for damages should have been established at the stage of 'liability/merits'.

11] The respondent accordingly brought a substantive application for leave to amend her particulars of claim to which answering and replying affidavits were delivered. The application was argued before Collis J on 10 May 2021 (the court *a quo*). Before the judgment on the application could be delivered, Haupt AJ was approached and granted a consent order regarding the children's loss of support. The issue concerning the amendment claiming general damages and future medical costs was postponed *sine die*. On 2 September 2021, Collis J granted the respondent leave to amend her particulars of claim and subsequently refused leave to appeal.

[12] Before us, the appellant abandoned the first three grounds of objection. The appellant argued that the suffering of psychological trauma should have been dealt with during the 'liability trial' phase. And that the subsequent 'quantum' phase would be limited to evidence related to the number of counselling sessions and similar details to quantify the psychological trauma claims. The appellant submitted that the order of Rangata AJ had already determined the appellant's liability to compensate the respondent regarding her claim for loss of support. The appellant argued that if general damages were to be claimed arising from psychological trauma and the medical costs required to address it, the 'liability' stage of the trial would need to be reopened. It would thus prejudice the appellant if the amendment was allowed.

[13] The appellant's argument overlooks the ambit of the order granted by Rangata AJ. As indicated, the sole issue to be decided was whether the appellant's employees were negligent and whether that negligence caused the death of the deceased. That, too, was the extent of the order. The trial court was not asked to, nor did it, determine whether any damages had been caused by the death of the deceased. For that reason, a claim for general and medical damages sustained as a result of psychological trauma stands on precisely the same footing as the claim for loss of support. The order simply found that negligence on the part of the employees of the appellant had caused the death of the deceased. Counsel for the appellant was constrained to concede that this was the case.

[14] The difficulty arose in this matter because the parties and trial court did not observe the cautionary words of Nugent JA in *Denel*. He explained why that is the case in *Bernert*:

‘In some cases it might be appropriate to order the separation of the “merits” and the “quantum” of the claim. But to use that terminology when the causative link between the wrongful act and the damage is a contested element of the claim, as it was in this case, is bound to create uncertainty.’³

That is clearly what happened in this matter.

[15] In summary, the ‘liability’ determination was restricted to establishing if the defendant's negligence caused the death itself. It did not extend to causation of the various damages allegedly flowing from that death, such as loss of support, medical costs, or emotional trauma. The parties did not include those aspects in the stated case for the trial court to determine. Following the grunt of the amendment, the appellant will be entitled to plead to the claim and provide expert evidence. The owners will remain on the respondent to prove her claim

³ *Bernert* fn 2 para 3.

that she entered the minor and had suffered psychological trauma. As such, the grant of the amendment can in no way prejudice the appellant.

[16] The appeal falls to be dismissed. Typically, the losing party bears the legal costs. However, in this case, both parties disregarded the repeated warnings from various courts about the importance of clearly categorizing the issues under consideration. To convey the court's dissatisfaction with the parties' conduct, no order regarding costs will be issued.

[17] Accordingly the following order is granted:

The appeal is dismissed.

K E MATOJANE
JUDGE OF APPEAL

Appearances

For the appellant:

Ms L Maite

Instructed by:

State Attorney, Pretoria

State Attorney, Bloemfontein

For the respondent:

Ms WL Munro

Instructed by:

Adams and Adams Attorneys, Pretoria

Lovius Block Attorney, Bloemfontein