

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
8 March 2022

Case number:26267/21

In the matter between:

M[....] B[....] M[....]

obo M[....] M[....]

Plaintiff

and

ELEVATOR MAINTENANCE COMPANY

Defendant

JUDGMENT

MAKHOBHA J

1. The plaintiff instituted a claim for damages against the defendant as a result of injuries sustained by her minor child who fell from a elevator shaft.
2. Paragraph 4.5 of the plaintiff's particulars of claim avers as follows:
*"4.5 The incident occurred as a result of the negligence of the employees of the defendant in one or more of the following respects:
4.5.1 They failed to close the doors of the elevator shafts after completing their work/or the day;*

4.5.2 *They failed to block the open shafts with any objects to avoid anyone falling into the shafts; and*

4.5.3 *They failed to cordon off the open shafts nor put up any danger signs around the open shafts"*

3. The defendant noted two exceptions against the plaintiff's particulars of claim namely:
 - 3.1 An exception that the plaintiff's particulars of claim lacks averments to sustain a cause of action.
 - 3.2 That the plaintiff's particulars of claim being one for personal injuries, is vague and embarrassing in the light of Rule 18(10).
4. In reply to the exceptions the plaintiff submits that on proper consideration and analysis of the authorities it cannot be said that breach of legal duty has to be particularly pleaded. Only the court can make a determination as to the existence or not of legal duty of care.
5. In regard to the exception raised in terms of rule 23 (1) and 30 A, the plaintiff submits that the full extent of injuries is normally made available through medico-legal assessments which are available in the course of litigation and particularly at quantum determination.
6. In *Hawekwa Youth Camp and another vs Byrne 2010 (6) SA 83 (SCA) at page 90 J* the court said *'negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. "*
7. In the case of *Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd 2006 (3) SA 138 (SCA) at page 144B* the court said wrongfulness depends on the existence of a legal duty not to act negligently.
8. In my view it is clear from the decisions I have referred to above that the plaintiff cannot simply aver negligence. It is imperative for the plaintiff to lay a basis for negligence in the particulars of claim and the plaintiff must aver that there was a legal duty upon the defendant's employees which they wrongfully and culpably breached.
9. Consequently, the first exception is upheld with costs, inclusive of the costs of

senior counsel.

10. Rule 18 (10) reads as follows:

"(10) the defendant reasonably to assess the quantum thereof Provided that a plaintiff suing/or damages/or personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for."

11. In my view Rule 18 (10) does not require the plaintiff to plead evidence. In the present matter before me paragraph 5 to 7 of the particulars of claim are sufficient, clear and concise and defendant can simply plead thereto.

12. I, make the following order

12.1 The first exception is upheld with costs including the cost of senior counsel.

12.2 The second exception is dismissed with costs.

12.3 The plaintiff is permitted to file amended particulars of claim within 15 (fifteen) days from the date of this order, failing which the defendant shall be absolved from the instance with costs.

D MAKHOB
JUDGE OF THE GAUTENG DIVISION PRETORIA

APPEARANCES:

For the plaintiff: Advocate A Moja
Instructed by: TC Mphela Attorneys

For the defendant: Advocate T.A.L.L Potgieter SC
Instructed by: Savage Jooste & Adams Inc

Date heard: 24 January 2022
Date of Judgment: 8 March 2022