

SOUTH AFRICA / JUDGMENT

Changing Tides 74 (Pty) Ltd v Super Group Trading (37275/18) [2019] ZAGPJHC 325 (22 August 2019) [2019] ZAGPJHC 325

COURT

South Gauteng High Court, Johannesburg

BEFORE

M B Mahalelo

CASE / FILE NUMBER

37275/18

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 37275/18

In the matter between:

CHANGING TIDES 74 (Pty) Ltd Plaintiff

and

SUPER GROUP TRADING (Pty) Ltd Defendant

J U D G M E N T

MAHALELO, J:

- [1] This is an exception to the defendant's plea to the plaintiff's particulars of claim on the ground that it lacks averments which are necessary to sustain a defence. The plaintiff's claim is based on a written lease agreement concluded between the parties in terms of which the plaintiff let to the defendant certain premises for a period of 5 years commencing on 1 May 2013 and terminating on 30 April 2018.
- [2] For the sake of convenience I shall refer to the parties as the plaintiff and the defendant.

[3] On or about 25 April 2013 the plaintiff and the defendant, both represented by their duly authorised representatives, concluded a written lease agreement the relevant material express terms, alternatively implied terms, further alternatively tacit terms of which were inter alia, the following:-

3.1 The plaintiff let to the defendant the premises described as Portion of 269 Inanda Road, Sea Cow Lake, Durban, KwaZulu Natal, comprising of approximately 8 998 square meters (i.e. 8 428 square meters warehouse space and 570 square meters office space) ('the premises').

3.2 The lease would be for a period of five years commencing on 1 May 2013 and terminating on 30 April 2018;

3.3 The defendant would pay to the plaintiff the specified monthly rental (excluding VAT), and all other amounts provided for in the lease, including, but not limited to pay all electricity, power, sewerage and water consumed at the premises; together with the proportionate share of all electricity, power and water consumed on or in the common areas of the premises;

3.4 The defendant would not be entitled to withhold or delay payment of any amount due to the plaintiff in terms of the lease and the defendant abandoned all or any rights of set-off;

3.5 No relaxation which the plaintiff may give at any time whatsoever in regard to the carrying out of any of the defendant's

obligations in terms of the lease would prejudice or would be a waiver of any of the plaintiff's rights in terms of the lease;

3.6 The lease contained all the terms and conditions of the lease concluded between the plaintiff and the defendant;

3.7 No variation of the lease would be binding unless it was in writing and was signed by both the plaintiff and defendant;

3.8 The rental would be paid in advance on the first day of each and every month, without deduction or demand and free from bank exchange.

[4] In the premises, the plaintiff alleges that the defendant is in breach of the lease agreement in that it failed to pay the rental amounts. The plaintiff alleges that the amount of R1 764 628.99 was due, owing and payable. Further, the defendant is also liable to pay interest on the aforesaid amount at the rate of 10.25% per annum from date of service of the summons to date of final payment.

[5] After the plaintiff had caused the summons to be issued against the defendant claiming the above mentioned amount, the defendant filed its notice of intention to defend and subsequently pleaded to the plaintiff's particulars of claim.

- [6] The plaintiff's exception concerns the defendant's plea to paragraphs 7 to 10 of its particulars of claim. In paragraphs 7 to 10 the following is pleaded:

"7. The defendant vacated the premises in April 2018.

BREACH

8. during the period of lease, from the commencement date (i.e 1 May 2013) until April 2018, the defendant breached the provisions of the lease by failing, refusing, and/or neglecting to pay all the amounts when they became due and payable, and in so doing, the defendant fell in arrears in the amount of R1 764 628,99.
9. a copy of the tenant account statement in respect of all amounts payable by the defendant, and all amounts paid by the defendant, is annexed hereto, marked as Annexure "B".
10. in the premises the defendant is liable to pay to the plaintiff the amount of R1 764 628.99 which amount is due, owing and payable."

- [7] In the defendant's plea at paragraph 5 the following is stated:

"Ad paragraphs 7, 8, 9 and 10

5.1 Each and every allegation herein contained is denied as if specifically traversed and the plaintiff is put to the proof thereof".

- [8] The plaintiff complains that the defendant's plea does not disclose a defence.

THE LAW

- [9] In analysing the purpose of pleadings the court held in *Imprefed (Pty) Ltd v National Transport Commission 1993*

- (3) SA 94 (AD) at para 32 as follows:

"At the outset it needs hardly be stressed that: The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed." (Durban v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1082.) This fundamental principle is similarly stressed in Odgers' Principles of Pleadings and Practice in Civil Actions in the High Court of Justice 22nd ed at 113: "The object of pleading is to ascertain definitely what is the question at issue between the parties, and this object can only be attained when each party states his case with precision".

- [10] To achieve this goal it has been stated that pleadings must be lucid, logical and intelligible. See *Trope v South African Reserve Bank and Another 1992 (3) SA 208 (T)*.

- [11] A litigant must plead his cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he has to meet. A litigant who fails to do so may not thereafter advance a contention of law or fact if its determination may depend on evidence which his opponent has failed to place before court because he was not sufficiently alerted to its relevance.

- [12] In this matter the complaint is directed at the defendant's plea. It is trite that defective pleadings of a plaintiff and that of the defendant are treated on an equal footing. See *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA). The clarity and precision required of a pleading are explained in *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (WLD) as follows:

"The plaintiff is required to furnish an outline of its case. That does not mean that the defendant is entitled to a framework like a cross-word puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements."

- [13] An exception that a plea is vague and embarrassing strikes at the heart of the claim, or as in this case the defence, and the formulation of the cause of action and its legal validity. It is not directed at a particular paragraph within a cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing. As was stated in *Jowell v Bramwell* supra at 905E-H:

"I must first ask whether the exception goes to the heart of the claim and, if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet."

- [14] An exception to a pleading on the ground that it is vague and embarrassing involves a twofold consideration. The first is whether

the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important test. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated. See *Trope v South African Reserve Bank* 1992

- (3) SA 208 (T).

- [15] Some particularity is required in pleadings and it follows that where averments in pleadings are vague and embarrassing, alternatively

lacks averments necessary to sustain a defence, a party is entitled to deliver an exception to the pleading. In *Trope* supra the court noted the following in respect of the degree of particularity required in a pleading:

"Rule 18(4) of the Uniform rules of court provides that that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto. It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form;

the cause of action or defence must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4). At 264 the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading. The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law.”

THE DEFENDANT’S PLEA

[16] The plaintiff’s complaint is that the defendant’s plea is simply a bare denial and does not disclose a defence. I understand

why the plaintiff has complained. This is because the defendant has not pleaded in accordance with Rule 18(4) of the Uniform Rules. In my view the defence raised by the defendant is of such a nature that the plaintiff does not know the case he is to meet in that the allegations necessary to establish a defence have not been made. A defendant is obliged to admit or deny or confess and avoid the averments made by the plaintiff in its particulars of claim. The defendant has attempted to do so in paragraph 5 of its plea but it is unclear what is denied. It is not clear if the defendant deny that it vacated the premises in April 2018, that it breached the lease agreement by not paying the claimed amounts, if it denies the amounts specified in annexure “B” which it is alleged it paid or whether it denies the amounts claimed as specified in annexure “B” to be due, owing and payable. If the defendant’s defence is that it made payment then it should plead it.

[17] The defendant has supplied insufficient particulars in response to paragraphs 7, 8, 9 and 10 of the plaintiff’s particulars of claim such that the plaintiff will be prejudiced if required to reply thereto.

[18] In the circumstances I make the following order:

1. The exception is upheld.
2. The defendant is afforded 10 days to amend its plea.
3. The defendant to pay costs of the exception on party and party scale.

M B MAHALELO

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

FOR THE PLAINTIFF: ADV W F WANNENBURG

INSTRUCTED BY: ESTHE MULLER INCORPORATED

FOR THE DEFENDANT: ADV G MEYER

INSTRUCTED BY: FLUXMANS ATTORNEYS

DATE OF HEARING: 18 JUNE 2019

DATE OF JUDGMENT: 22 AUGUST 2019

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Prepared on 10 October 2026 · Esheria