

SOUTH AFRICA / JUDGMENT

Exilite 4205 CC v Jacobs and Another (2347/2022) [2024] ZANWHC 98 (8 April 2024)

[2024] ZANWHC 98

COURT

North West High Court, Mafikeng

BEFORE

Mfenyana

CASE / FILE NUMBER

2347/2022

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTHWEST DIVISION,

MAHIKENG

CASE NUMBER: 2347/2022

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates:

NO

Circulate to Regional

Magistrates: NO

In the matter between: -

EXILITE

4205 CC

Plaintiff

and

HUGH

HAROLD JACOBS

1st Defendant

AFRITANS

SOLUTIONS

2nd
Defendant
CORAM: MFENYANA J
This judgment was handed
down electronically by circulation to the parties'
representatives via email. The date for hand-down is deemed to
be 14h00 on 08 April 2024.
ORDER
The exception is
dismissed with costs.

JUDGMENT

MFENYANA J

INTRODUCTION

- [1] The plaintiff issued summons against the first and second defendants for breach of contract. The first defendant is cited in his capacity as the sole owner of the second defendant.
- [2] On 21 November 2022 the defendants delivered a notice of exception contending that the plaintiff's particulars of claim lack averments necessary to sustain a cause of action and do not disclose a cause of action.
- [3] Essentially, the defendants aver that the particulars of claim lack averments necessary to sustain a cause of action, and they would be embarrassed if expected to plead to the particulars of claim in their current form. They seek an order upholding the exception and dismissing the plaintiff's claim with costs on attorney and client scale.
- [4] The grounds of exception are set out extensively in the notice of exception. While the defendants relies on twelve grounds of exception, the common thread that runs through all of them is that the plaintiff failed to plead averments necessary to sustain a cause of action.
- [5] The plaintiff has opposed the application.
- [6] The setting against which the present application is brought is a written agreement concluded by the parties for the development and construction of a dwelling described as Erf 1[...] F[...] Street Christiana. The terms of the agreement have not been placed in dispute by any of the parties.
- [7] Before delving into the grounds of complaints raised by the defendants, it is necessary to examine the provision of the Rules which gives rise to the present proceedings.

DEFENDANTS' EXCEPTION

[8] In the notice of exception, the defendants raise twelve grounds of exception. In summary, they contend that they are unable to plead to the plaintiff's particulars of claim, as they do not set out averments necessary to sustain a cause of action, particularly in relation to inter alia the following aspects:

8.1. Referral of the dispute to arbitration.

8.2. Voluntary liquidation of the second defendant.

8.3. Notice of breach and the plaintiff's failure to attach same.

8.4. Non-compliance with the payment provisions of the agreement and the plaintiff's failure to attach same.

8.5. The status of the snag list and non-compliance with the non-variation clause.

8.6. Unjust enrichment.

8.7. Section 424 of the Companies Act 61 of 1973.

8.8. Details of the quote submitted for repair work for poor workmanship.

8.9. Particulars of the person who represented the plaintiff (close corporation) and against which defendant relief is sought.

8.10. The basis on which the plaintiff seeks to enforce a claim owed by the first defendant to the second defendant, and the banking details of the second or first defendant.

THE LAW RELATING TO EXCEPTIONS

[9] It is a basic rule of pleading that the pleader must set out the facts which briefly and concisely identify the issues relied upon. In the case of particulars of claim, the plaintiff is required to set out a complete cause of action.

[10] An exception is a party's objection to a pleading that appears, on the face of it, to be materially defective in its formulation. An exception presupposes that the case is without legal merit on the basis of the defects identified.

[11] Rule 23(1) provides:

"23 Exceptions and applications to strike out

(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception. Provided that –

- (a) Where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice, and
- (b) the party excepting shall within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.”

[12] Relatedly, Rule 18(4) provides:

“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, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

[13] An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold 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.[1] It is not directed at a particular paragraph within the cause of action but goes to the entire cause of action. An exception ‘founded

upon the contention that a summons discloses no cause of action... is designed to obtain a decision on a point of law which will dispose of the case in whole or in part and avoid the leading of unnecessary evidence at the trial. If it does not have that effect the exception should not be entertained’.[2]

[14] In the present case inasmuch as the defendant avers that they would be embarrassed if they were to plead to the particulars of claim as they stand, their reliance is predominantly on the ground that the particulars of claim lack averments necessary to sustain a cause of action.

[15] In *Trope v South African Reserve Bank*[3], the following is stated:

“An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold 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, or indeed the most important, test. If that were the only test the object of pleadings to enable parties to come to trial, prepare to meet other’s case and not be taken by surprise may well be defeated... .”[4]

[16] In *Jowell v Bramwell-Jones and Others*[5] the court noted as follows:

“... (T)he plaintiff is required to furnish an outline of its case. This does not mean that the defendant is entitled to a framework like a crossword 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.”[6]

[17] The plaintiff’s claim is based on a written agreement. To persuade the Court that the defendants have committed a breach of the material terms of the agreement, the plaintiff is required to allege and prove the existence of the agreement, which talks to the parties’ animus contrahendi. It must further plead the material terms of the agreement.

[18] Rule 18(6) is instructive in this regard. It reads:

“A party who in such party’s pleading relies upon a contract shall state whether the contract is written or oral, when, where and by whom it was concluded, and if the contract is in writing a copy thereof or of the part relied on in the pleading shall be annexed to the pleading.”

[19] From the above authorities it can be gleaned that it is not necessary for the plaintiff to set out the facta probantia of its claim. As long as the claim is pleaded with sufficient logic, and lucidity for the opposite party to discern what case it has to meet, the requirements have been satisfied.

[20] In its particulars of claim the plaintiff pleads that on 20 July 2020 it concluded an agreement with the second defendant where the second defendant was represented by the first defendant. The said agreement is attached to the particulars of claim. There does not appear to be any dispute regarding the existence of the agreement or its terms.

[21] The material terms of the agreement are also pleaded, the crux of which is that the parties agreed that the second defendant would develop, improve and erect a property for household use at Erf 1[...] F[...] Street Christiana for an amount of R1 316 105.29.

[22] A further term of the agreement was to set out avenues were available to the parties in the event of a breach of the terms of the agreement. It recorded that if the work performed by the second defendant did not meet the required professional standard agreed to by the parties, the second defendant would be liable for the costs incurred in doing the extra work.

[23] The plaintiff pleaded that the second defendant breached the terms of the agreement in that the work it performed did not meet the agreed professional standard. It avers that on 8 November 2021 the plaintiff provided a snag list to the first defendant and the first defendant failed to rectify the defects despite several meetings being held and

despite undertaking to rectify its shortcomings.

- [24] Consequently, the plaintiff claims an amount of R753 881.22 against the first defendant which it alleges is the total amount it paid directly to the first respondent in respect of the services rendered by the defendants. It avers that the balance of the value of the services was paid by the plaintiff to the defendants' sub-contractor and suppliers at the instruction of the first defendant.
- [25] The plaintiff argues that the second defendant, and not the first defendant was entitled to receive the payment but due to the first defendant providing its own account number, and not that of the second defendant, payment was received into the first defendant's bank account for which amount the first defendant would be unjustly enriched by its misrepresentation of the bank account.
- [26] In the alternative, the plaintiff claims an amount of R448 296.62 which it alleges the first defendant is liable for in terms of Section 424 of the Companies Act[7], or as a result of the reckless manner in which he allegedly conducted the business of the second defendant, or the amount quoted by a separate contractor for repairs, for the poor workmanship of the second defendant.
- [27] The plaintiff is required to plead the facts upon which it relies for the conclusions reached and that which she wishes the court to draw from those facts. 'It is not necessary in any pleading to state the circumstances from which an alleged implied term can be inferred.'[8]
- [28] The onus to prove that a pleading is excipiable rests with the excipient. They must prove that upon every interpretation that can reasonably be attached to it, the pleading is excipiable.
- [29] In *Southernpoort Developments (Pty) Ltd v Transnet LTD*[9] the court formulated the following test for an exception to succeed:
1. The excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it.
 2. A charitable test is used on exceptions, especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation.
 3. The Court should not look at a pleading 'with a magnifying glass of too high power'.
 4. The pleadings must be read as a whole; no paragraph can be read in isolation.
- [30] The defendants contend that the plaintiff did not make any averments that the dispute had been referred for arbitration as stipulated in the agreement. They argue that in terms of the agreement the decision of the arbitrator would be final and binding. In the heads of argument, the defendants argue that the plaintiff's claim is premature.
- [31] Inevitably the issue of referral to arbitration talks to the issue of jurisdiction; whether the court could in the present seating entertain the dispute. It would ordinarily be raised in a form of a special plea and has no bearing on the formulation of the pleading itself.

- [32] The issue that arises in this regard is whether it was open to the defendants to raise the issue of arbitration in an exception. I think not. To my mind a party's failure to comply with an arbitration clause in a contract, speaks to the parties' rights in terms of that agreement. It does not lend itself to rules of pleadings, which is what exceptions are concerned with. In any event, it does not go to the root of the cause of action and has the effect of staying the proceedings subject to Section 6(1) of the Arbitration Act[10]. This ground of exception must therefore not be sustained.
- [33] As regards the other grounds, the defendants contend that the absence of various averments stipulated in the notice of exception, make it impossible for them to plead or that it would cause them embarrassment if they attempted to. These averments relate to voluntary liquidation, notice of breach, proof of payment to cite a few. In some instances, the defendants require details of what they construe to be further agreements for rectification and variation of the existing agreement.
- [34] The question is whether the particulars complained of are strictly necessary for the defendants to plead and to prevent him being taken by surprise at trial. What appears to be the case is that the defendants have embarked on an elaborate scheme of nitpicking the particulars of claim. Their complaints cover an array of issues, which are in my view, not necessary for purposes of pleading. Some relate evidence required to prove the plaintiff's claim; some relate to defences available to the defendants. Other grounds pertain to specific details of the case and others are purely argument open for the defendants to raise at the trial of the matter.
- [35] Rule 18 does not require a party to set out the averments with such certainty that there is no room for any adjustments, but that the defendant should know what case it has to meet at trial, and consequently what evidence to prepare. At the very least, the pleading must be such that the opposing party is placed in a position to plead without risking an excipiable plea.
- [36] In *McKenzie v Farmers' Cooperative Meat Industries Ltd*[11] the erstwhile Appellate Division defined 'cause of action' thus:

"...every fact which it would be necessary for the respondent to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved[12].

(my emphasis)

- [37] Whether the plaintiff is entitled to or will succeed in its claims as set out in its particulars of claim, is not something this Court, seized with the exception, should concern itself with. The issue is rather whether the particulars of claim as they stand, are such that the defendants ought to be in a position to plead thereto.

CONCLUSION

- [38] Having regard to the plaintiff's particulars of claim as they stand, I cannot find any conceivable reason why the defendants would not be able to plead to them. I must immediately concede that the particulars of claim are not a model of perfection. Precision is however not what is required. Neither is certainty that the defendants should mount a redoubtable defence to the claim. Whether the plaintiff's case falls or stands on account of its particulars of claim on trial, is immaterial for purposes of the present enquiry.
- [39] None of the decisions relied on by the defendants shed any light on the determination of the excipiability of the particulars of claim. They relate purely to the aspects of law raised therein, which as I have found, have no bearing on the excipiability of the plaintiff's particulars of claim.
- [40] The posture adopted by the defendants stretches the reach of the legal regime pertaining to exceptions far beyond what the law envisages. For that reason and the reasons alluded to above, the exception must fail.

[41] In the result I make the following order:

S MFENYANA

JUDGE OF THE HIGH COURT

APPEARANCES

For the excipients/defendants: PJS Smit Instructed by: Schoeman Steyn Inc. Email: litigation@schoemansteyn.co.za c/o Labuschagne Attorneys Email: litigation2@labuschagneatt.co.za For the respondent/plaintiff: AP Berry Instructed by: JAC N Coetzer Attorneys Email: henry@jacncoetzer.co.za c/o Maree & Maree Attorneys email: lit2@maree-mareeattorneys.co.za Date reserved: 18 August 2023 Date of judgment: 08 April 2024

- [1] Trope v South African Reserve Bank 1992 (3) SA 208 (T).
- [2] See in this regard: Erasmus, Superior Court Practice, D1 – 296.
- [3] n.1 supra.
- [4] Para 221A-E.
- [5] 1998(1) SA 836 (W).
- [6] Para 913B-G.
- [7] Act 61 of 1973.
- [8] Rule 18(7) of the Uniform Rules of Court.
- [9] 2003(5) SA 665 (W).

[10] Act 42 of 1965.

[11] 1922 AD 16.

[12] Para 23.

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