

SOUTH AFRICA / JUDGMENT

Giant Leap Workspace Specialists (Pty) Ltd v Scoin Trading (Pty) Ltd t/a The South African Gold Coin Exchange (2014/37464) [2016] ZAGPJHC 321 (23 November 2016)

[2016] ZAGPJHC 321

COURT

South Gauteng High Court, Johannesburg

BEFORE

M Olivier

CASE / FILE NUMBER

2014/37464

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2014/37464

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

23/11/2016

In

the matter between:

GIANT

LEAP WORKSPACE SPECIALISTS

(PTY)

LTD Plaintiff/Respondent

AND

SCOIN

TRADING (PTY) LTD t/a THE SOUTH AFRICAN

GOLD

COIN

EXCHANGE Defendant/Excipient

JUDGMENT

OLIVIER AJ:

1. INTRODUCTION & FACTUAL

BACKGROUND

- [1] This is an exception taken by the defendant in the main action, against the particulars of claim of the plaintiff, on the basis that the plaintiff's particulars of claim does not disclose a cause of action, alternatively that it is vague and embarrassing. (I shall refer to the parties as they appear in the main action.)
- [2] The defendant prays for an order in the following terms:
- That the exception be upheld, with costs;
- That the plaintiff's particulars of claim be struck out;
- That the plaintiff's action be dismissed, with costs;
- Further and/or alternative relief.
- [3] The defendant served a notice in terms of rule 23(1) to withdraw the cause of the complaint, on the plaintiff on 4 February 2015, but on 22 April 2015 withdrew this notice. A notice of exception was subsequently served on 25 June 2015, which set out four grounds on which the defendant relied. The defendant subsequently abandoned one of the grounds.
- [4] The plaintiff issued summons against the defendant on 13 October 2014 for the payment of R 510 360.99, the amount allegedly
- outstanding for making renovations to the Sandton head office of the defendant.
- [5] The parties concluded a written contract ("the appointment contract") on 14 June 2013. The plaintiff avers that a second contract was concluded towards the end of November 2013, partly written and partly verbal. This alleged contract is unsigned. I shall refer to it as "the second contract" for sake of convenience.
- [6] In terms of the appointment contract, the defendant confirmed the appointment of the plaintiff as interior architect, designer and construction manager for phases 1-10 of the renovation project. The parties agreed on certain work which the plaintiff would do. The plaintiff would charge the defendant an all-inclusive fee of R 350 per business function point, for the preparation of the budget and the space planning of the project work ("the appointment fee"). The defendant accepted the plaintiff's schedule of fees and terms and conditions of the agreement, according to the plaintiff.

- [7] The plaintiff avers that the defendant paid only 50% of the appointment fee, but remains indebted to it for the remainder.
- [8] The plaintiff alleges that on 20 November 2013 it submitted a written summary quotation to the defendant for the project (“the written quotation”), together with terms and conditions negotiated and agreed upon by the parties (“the terms and conditions”). These were approved by the defendant in writing, according to the plaintiff, which resulted in the second contract. However, the terms and conditions were not formally signed.
- [9] The plaintiff alleges that it reached ‘practical completion’ of the contract, and invoiced the defendant in the amount of R 1887 336.20, including the balance of the appointment fee.
- [10] The defendant took occupation of premises on 27 January 2014. Only the amount of R 1 200 350.30 was paid by the defendant. The plaintiff claims the outstanding balance, minus an alleged deduction from the balance of the purchase price for work not completed by the plaintiff in the amount of R 176 624.97.

II. THE EXCEPTIONS

Failure to disclose a cause of action

- [11] First, the defendant contends that the quotation, together with the terms and conditions, constitute an amendment or variation to the first contract, which should have been done in writing, in accordance with the provisions of the first contract. Of relevance is clause 8 – the non-variation clause – in the appointment contract:

“This agreement represents the entire agreement between the parties, and no variation, amendment or cancellation thereof shall be of any force and effect unless reduced to writing and signed by the parties. It is anticipated that these terms will be amplified in a more comprehensive agreement on approval of the final budget and constructions specifications. If no agreement can be reached and the project does not proceed with Giant Leap for any reason whatsoever, the terms of this agreement

will prevail.’ (My emphasis)

- [12] Thus, argues the defendant, the plaintiff cannot rely on the alleged second contract, as it was not signed, making it null and void. It cannot be used by plaintiff to formulate an action.
- [13] Furthermore, clause 22.4 of the second contract states that “the contract shall become effective only when it is signed by both Giant Leap and the Client.” This, argues the defendant, also shows that the plaintiff cannot rely on the second contract, as there was no compliance with this clause. The second contract was therefore not effective.
- [14] The plaintiff, on the other hand, contends that the quotation and the terms and conditions amount to a new contract, meaning that there was no need to comply with clause 8 in the appointment contract. What the provision requires is that a variation or amendment to the first contract should be in writing and signed by the parties. The clause does not apply to a new contract. An important question is the meaning of amplification.

- [15] The plaintiff argues that the defendant's 'constrained' interpretation of clause 8 would result in the liability of the defendant to plaintiff being restricted to the appointment fee only, which is only about the preparation of the budget and the space planning of the project – not any of the renovation work.
- [16] Rule 18(4) of the Uniform Rules of Court provides 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, as the case may be, with sufficient particularity to enable the opposite party to reply thereto." If this is not complied with, the pleading is excipiable. The onus is on the excipient to persuade the court that upon every interpretation which the pleadings can reasonably bear, no cause of action is disclosed. Or in other words, it is for the excipient to show to the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts. See *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) 232C-E.
- [17] An exception based on the contention that no cause of action is disclosed, is aimed at obtaining a decision on a point of law which will be dispositive of the case, in whole or in part, without the need to lead unnecessary evidence at trial. See *Alphina Investments Ltd v Blacher* 2008 (5) SA 479 (A) at 483B.
- [18] The Supreme Court of Appeal has made it clear that an exception can be upheld on this ground only if the claim is bad in law, not that it may be bad in law. See *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 960 (SCA) at 965:

It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it is shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not 'may be') bad in law.

- [19] In respect of an exception based on the interpretation of contract specifically, *Herbstein & Van Winsen* (at 639) cautions as follows:

Courts are reluctant to decide upon exception questions concerning the interpretation of a contract where its meaning is uncertain. When the exception is based upon an interpretation of a contract, it is necessary for the excipient to demonstrate that the contract is unambiguous.

This does not mean that the mere notional possibility that evidence of surrounding circumstances may influence the interpretation of a contract would necessarily operate to debar a court from deciding the issue on exception. The contention that such evidence exists must be examined with care and difficulty in interpreting a document does not necessarily imply that it is ambiguous.

- [20] Of great significance, in my opinion, is that was said in *Sacks v Venter* 1954 (2) SA 427 (W) at 429:

I think it is clear that if the condition is unambiguous so that evidence is not admissible for its interpretation, the question of its interpretation can properly be decided on exception; *Standard Building Society v Cartoulis* 1939 AD 510 its authority for this. The question then is whether clause 7 unambiguously bears the meaning contended for ... or whether it is ambiguous and whether evidence of the circumstances in which the agreement was made would be admissible to elucidate its meaning. In order to succeed, the excipient must show that the clause is unambiguous and that the meaning for which he contends is the correct meaning.

Unambiguous means that it is the only meaning to be assigned to the contract, not one of many possible meanings. This is in accordance with the SCA decision in *Vermeulen supra*.

[21] Even though decided in the Zimbabwe High Court, *McKelvey v Cowan* NO 1980 (4) SA 525 (Z) at 526 is of relevance:

It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.

[22] In respect of varying a contract containing a non-variation clause, by oral agreement, the Appellate Division in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 767A said:

“Dit sou ‘n opvallende afwyking wees van die elementere en grondliggende algemene beginsel wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word. ... Dit is geen antwoord hierop om aan tevoer dat dieselfde van die latere mondelinge ooreenkoms gese kan word nie. Dit staan op n ander voet, want die partye het self hul eie bevoegdheid aan bande gele deur hulle aan n formele vereiste te bind, en vooruit bepaal dat so n ooreenkoms nie afgedwing kan word nie. Deur so n oorekkenkoms ten spite daarvan in stand te hou, sou die Hof aan die party wat hom op ongelidigheid bereop, juis DIE voordeel ontnem wat hy met die verskansende bepaling vir himself wou verseker en waarop hy luidens daardie bepaling geregtig is. Dit gaan ook nie op om te beweer dat dit strydig met die openbare belang sou wees om so n beperking te erken nie, Die beperking sluit nie kontraktuele Vryheid uit nie. Die partye sou hul kontrak nog na willekeur kan wysig, mits hulle aan die self-opgelegde formele vereiste voldoen.”

[23] And later, the same court expressed itself as follows in *Affirmative Portfolios CC v Transnet Limited t/a Metrorail* [2008] ZASCA 127; 2009

(1) SA 196 (SCA) par 17-18:

[17] If it was indeed the common intention of the parties that the rates be varied the appellant could have availed itself of the equitable remedy of rectification. In the event, however, it chose not to do so and is bound to the terms of the written agreement.

[18] Reliance cannot be placed on the allegation ... that the agreement was varied tacitly or by conduct in light of the foregoing. Furthermore clause 10.1, which is in effect a non-variation clause, entrenches the pricing provisions against oral or tacit variation. The binding nature of such a provision was emphasised in *SA Sentrale Ko-op Graanmatskappy Bpk v Shifren en Andere* and affirmed more recently in the case of *Brisley v Drotsky*.”

[24] Returning to clause 8, the clause regulates the first contract and its variation, amendment or cancellation. However, it deviates from a standard non-variation clause by anticipating an “amplification” of the terms of the first contract. The wording of the next sentence is instructive:

It is anticipated that these terms will be amplified in a more comprehensive agreement on approval of the final budget and constructions specifications. If no agreement can be reached and the project does not proceed with Giant Leap for any reason whatsoever, the terms of this agreement will prevail.’ (My emphasis.)

[25] It seems to me that it is at least a possible interpretation that the second contract could be concluded without the need for it to be reduced to writing and signed by the parties, as argued by the defendant. I am of the view that the term ‘amplified’

could be interpreted to include the conclusion of a new contract.

[26] Therefore, it is my view that the interpretation put forward by the defendant is not the only possible interpretation. The interpretation proffered by the plaintiff is not so remote as to make it completely implausible. The requirement of unambiguity is not satisfied, in my opinion. I leave the validity of the second contract itself, being partly written and partly oral, for determination by the trial judge, who will likely have the benefit of comprehensive argument on this point and the leading of evidence. This ground is not upheld.

[27] The defendant argues as its next point that it is unclear on which document the plaintiff bases its cause of action – on the first or the second contract or both. The defendant says that the plaintiff failed to allege whether the second contract replaced the first contract, or whether all the documents should be read together. The plaintiff disputes this, saying that it is clear from the papers that it pleaded the “terms of the comprehensive agreement that followed the appointment” (see particulars of claim, paras 6.3 and 7). I think this second point is without merit, and is also dismissed.

Vague and embarrassing

[28] Next is the question whether the plaintiff has with sufficient particularity pleaded an alleged deduction from the balance of the purchase price, to enable the defendant to plead thereto.

[29] The amount in issue is R 176 624.97, which plaintiff avers is the value of snags which the plaintiff was unable to fix due to the refusal of the defendant to give it access to the premises. The deductions are not itemised, but the plaintiff contends that this could be cured by requesting further particulars in terms of Rule 21.

[30] The defendant relies on Rule 18(10), arguing that it provides that a defendant in a damages claim should be given reasonably sufficient information to allow the defendant to calculate the quantum of the claim so it could tender an amount in settlement or payment into court, which upon acceptance would bring the dispute to an end. It is of the view that it cannot assess the quantum of the claim because of the plaintiff's failure to plead with sufficient particularity, as the plaintiff failed to set out how this amount was calculated. Defendant's counsel states it as follows in his heads of argument (para 36):

If required to plead to the particulars of claim as it stands the Excipient would only be able to in a bold and sketchy manner deny the allegation which in turn would not benefit the furtherance of the litigation between the parties.

[31] The plaintiff's argument is that there is nothing vague about either the allegation the plaintiff could not attend to the snags resulting from the refusal of the defendant to allow it on the premises, or the value that it has placed on the snags. The plaintiff further argues that it is not claiming damages from the defendant, and that the requirements of Rule 18(10) do not need to be complied with.

[32] An exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded. See *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 905 H-I. If the defendant knows which claim it must meet, the particulars of claim cannot be vague and embarrassing, and the exception cannot be upheld.

[33] This exception covers the instance where, although there is a cause of action, it is incomplete or defective in the way it is set out, resulting in embarrassment to the defendant. At issue is the formulation of the cause of action, not its validity. See *Trope v South African Reserve Bank* 1993 (3) SA 164 (A) at 269I.

[34] *Herbstein & Van Winsen* (636) says the following in respect of particularity, with reference to past case law:

It has been held that it is sufficient if a defendant knows 'adequately' what a plaintiff's case is or 'sufficiently' shows the defendant the case which he is called upon to meet.

[35] In *Troskie v Von Holdt and Others* (2704/2012) [2013] ZAECHGHC 31 at par 20 Goosen J said, with reference to *Jowel's* case:

In determining the question of vagueness, a court is called upon with reference to the pleadings read as a whole, to interpret the impugned averment(s) within the context of the pleading and is required to adopt a common-sense approach to the matter of interpretation mindful of the purpose that the pleading serves. In *Jowel v Bramwell-Jones and Others* 1998 (1) SA 836 (W) Heher J (as he then was) set out the principles applicable to determining an exception on the ground that a pleading is vague and embarrassing in detail. The learned judge stated (at 899G) that an exception that a pleading is vague and embarrassing cannot be directed at a particular paragraph with a pleaded cause of action. The exception must go to the whole of the cause of

action, which must be demonstrated to be vague and embarrassing. The learned judge then undertook a careful analysis of the rules relating to what is required to the particularity to be pleaded by a party and the range of remedies available for non-compliance with the rules. In dealing with exceptions based on alleged vagueness and embarrassment, the court stated (at 902H-903E) that:

It is therefore incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it. The attacks mounted by the defendants that their particulars of claim are vague and embarrassing cannot found on the mere averment

that they are lacking in particularity. This might, depending on the circumstances, allow an application in terms of Rule 30. An allegation that a pleading is vague and embarrassing is a far more serious one than a complaint about particulars.

Furthermore, in approaching these exceptions, I shall bear in mind the following general principles:

1. minor blemishes are irrelevant;
2. pleadings must be read as a whole; no paragraph can be read in isolation;
3. a distinction must be drawn between the *facta probanda*, or the primary factual allegations which every plaintiff must make, and the *facta probantia*, which are the secondary allegations upon which the plaintiff will rely in support of his primary allegations. Generally speaking, the latter are matters for particulars for trial and even these are limited. For the rest, they are matters for evidence;
4. only facts need be pleaded; conclusions of law need not be pleaded;
5. bound up with the last-mention consideration is that certain allegations expressly made may carry with them implied allegations and the pleading must be so read: cf *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982(4) SA 371 (D) at 377, 379B, 379G-H.

(My emphasis.)

[36] The fundamental questions are these: does the relevant pleading lack particularity to the extent that it is vague? And once vagueness has been established, does such vagueness cause embarrassment of such a nature that the excipient is prejudiced if it is required to plead thereto? See *Trope v South African Reserve Bank and Another* 1992

- (3) SA 208 (T) 211A-C. Put differently, the onus is on the excipient to show both vagueness amounting to embarrassment, and embarrassment amounting to prejudice.

[37] In a recent judgment in this division, Francis J expressed the approach as follows (Ramanna And Associates CC v Ekurhuleni Development Company (Pty) Ltd [2014] ZAGPJHC 73 at para 14):

If there is vagueness the court is obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of. See *Quinlan v MacGregor* 1960

- (4) SA 383 (D) at 393E-H. In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail. See *ABSA Bank Ltd v Boksburg Transitional Metropolitan Council* 1997
- (2) SA 415 (W) at 421J – 422A. The ultimate test as to whether the exception should be upheld is whether the excipient is prejudiced. See *Quinlan v MacGregor* supra.

[38] Defendant's counsel referred me to *Leatham v Tredoux* 1911 NPD 346, a case which dealt with the itemisation of different kinds of repair work:

The plaintiff does not set up the case that he is not in a position to analyse the sum of £450 [the amount claimed]. His statement

that it is an estimate does not excuse him from giving further particulars; unless it is a pure guess it must be an estimate based

on a collection of detailed estimates. I find it unnecessary to decide whether the damages claimed are 'general' or

'special': the substance of the matter is that the details of how the 450 is made up ought, if possible, to be in the

defendant's hands at the pleading stage, and there is no reason to doubt that the plaintiff is in a position to supply them.

[39] Although it would be preferable to have an itemised list, the fact that the particulars of claim may have been drawn in more precise terms does not, per se, render them vague. An excipient is required to show that he will be seriously prejudiced if the exception is not upheld (see *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A).

[40] In *Rolando Electrical CC v Munaka General Trading (Pty) Ltd and Others* (2011/6076) [2015] ZAGPJHC 238 Strauss AJ made the following finding on whether the lack of particularity in how an amount is made up, is vague and embarrassing (at paras 47 and 48):

However, what the second defendant does, is to refer and rely on the annexures and not the actual claim set out by the plaintiff in this claim against the defendants. This is the shortfall claim in which the plaintiff pleads that certain payments were made to the plaintiff by the joint venture and that it short-paid the plaintiff in regards to the amount of R7, 533, 476.31 which was an amount claimed by the plaintiff and submitted to the engineer for verification and approval.

48. The evidence with regard to the amount of shortfall payment does not strike at the root of the cause of action due to the lack of particularity in setting out how the R7 million was made up, and these averments may however be substituted by evidence. Thus, the exception on this score is dismissed.

[41] Reading the pleadings as a whole, and adopting a common-sense approach, I am of the view that there is no vagueness that causes embarrassment. The excipient is not prejudiced, and knows adequately what the case is that it must

answer. Further particulars may be requested in preparation for trial.

[42] This exception is also dismissed.

III. COSTS

[43] Costs are always within the discretion of the court, but it ordinarily follows outcome. See Union Government (Minister of Railways & Harbours) v Heiberg 1919 AD 477 at 484. I see no reason to deviate from this general rule.

IV. ORDER

[44] In the result the following order issues:

“The exception is dismissed with costs.”

M OLIVIER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

Date of judgment: 23 November 2016

Appearance on behalf of the Defendant (Excipient): Adv W C Carstens, instructed by Van der Merwe and Associates

Appearance on behalf of the Plaintiff: Adv J J Bitter, instructed by Darryl Ackerman Attorneys

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2016/321.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/giant-leap-workspace-specialists-pty-ltd-v-scoin-unknown-topic-agpjhc-2016>

Prepared on 12 October 2026 · Esheria