

SOUTH AFRICA / JUDGMENT

Hassim v Lishiva (35381/2020)

[2021] ZAGPJHC 120 (14 May 2021)

[2021] ZAGPJHC 120**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Majavu

CASE / FILE NUMBER

35381/2020

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: 35381/2020****NOT REPORTABLE****NOT****OF INTEREST TO OTHER JUDGES****REVISED****Date:**

17 May 2021

This

matter was heard virtually via Microsoft Teams platform

In

the matter between:

AKBAR

HASSIM

Plaintiff

and

LISHIVA,

ANDREW MBENGENI

Defendant

Coram:

Majavu AJ

Heard:

11 May 2021

Delivered: 14 May 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 13h00 on 14 May 2021

Summary: Exception- the defendant raised four (4) grounds of exception on the basis that the particulars of claim are vague and embarrassing, complained about paucity of information, resulting in its ability to decipher the case is called upon to meet, misconstrued the applicable principles relating to exception, complaining about lack of particularity that could be obtained through request for further particulars, or grounds dismissed with costs on a party and party scale, including those consequent upon the employment of counsel.

ORDER

(a)

The first to fourth grounds of exception are dismissed.

(b)

The defendant is ordered to pay the costs, on a party and party scale, including the costs consequent upon the employment of counsel.

Majavu

AJ

[1]

Before me is an exception, which is opposed.

[2]

The defendant raises four complaints on which the exception is based.

[3]

For better flow and ease of reading, I propose to restate the grounds as set out in

the notice of exception here under.

[4]

I will also deal with each in turn.

[5]

I must also commend both counsels for the detailed and helpful heads, for which I am grateful.

Grounds

of complaint

[6]

The defendant raises four grounds of complaint, premised on the absence of averments

necessary to sustain a proper cause of action,

as well as the presence of allegations which it contends render the particulars

of claim vague and embarrassing within the meaning of rule 23(1)[1]. It is common cause that the defendant afforded the plaintiff an opportunity to remove the cause of complaint, which invitation was not heeded, hence the adjudication of this exception.

A.

The defendant's grounds of complaint

The

first ground

[7]

"[1.1]

In paragraphs 11, 12, 13 and 14 of the particulars of claim the plaintiff premised

its claim on a settlement agreement concluded

between the plaintiff and the defendant. The settlement agreement, on the construction

of the plaintiff's allegations, was to know

vague and replaces all prior agreements concluded between the respective parties

(paragraphs 12.3). Here in the plaintiff in

paragraph 14 6 specific performance in terms of that agreement.

[1.2]

In contrast thereto, the plaintiff claims in paragraphs 15 to 23.2 an alternative claim which is not premised upon any conditional finding in respect of the main claim in respect of the settlement.

[1.3]

The alternative claim foreshadows a cancellation of the partnership agreement, which preceded the alleged settlement agreement.

[1.4]

The 2 claims are mutually destructive and cannot exist in unison if regard is had to the fact that the plaintiff is required to make an election in respect of the respective courses of action, albeit to

plead out the basis for the alternative claim.

[1.5]

As a consequence of the aforesaid, the defendant is embarrassed to plead

to the vague particulars and as a consequence is prejudiced.

The

second ground

[8]

"[2.1]

In paragraph 9 of the particulars of claim the plaintiff alleges that:-

" on various

occasions following the conclusion of the partnership agreement had with regular occurrence the defendant purportedly

orally acknowledged

his obligation to account and pay to the plaintiff"

[2.2]

The plaintiff has failed to set out with particularity on which respective dates such acknowledgement was advanced to allow the defendant to respond thereto sensibly.

[2.3]

As a consequence, the particulars of claim is vague and embarrassing and the defendant is embarrassed to plead thereto, resulting in prejudice to the defendant.

The

third ground

[9]

[3.1]

In paragraph 12 of the particulars of claim the plaintiff claims that on the strength of an oral agreement certain “material, alternatively tacit, further alternatively implied terms...” operate in terms thereof.

[3.2]

The plaintiff failed to allege out any conduct by the defendant to suggest

on what basis it may be concluded that the terms were either tacitly accepted, alternatively impliedly operating between the parties.

[3.3]

As a consequence, the defendant is embarrassed to plead thereto and suffers prejudice as a consequence thereof.

The

fourth ground

[10]

[4.1]

In paragraph 12.9 of the particulars of claim the plaintiff alleges that the defendant undertook to settle all loan amounts outstanding to Investec.

The plaintiff is

required to provide particularity on what, and to whom were these loans in favour and to supply all documentary proof relating thereto.

[4.2]

The plaintiff has failed to set out particularity on details of such loans, to whom such loan was provided to, what amount for and when such amount is due.

[4.3]

As a consequence, the defendant is embarrassed to plead thereto and suffers prejudice as a consequence thereof.

B.

The law applicable to exceptions

Vague

and embarrassing

[11]

In the case of Inzinger

v Hofmeyer and

others[2]
, it was said that:
“4. An exception
that a pleading is vague and embarrassing strikes at 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-Jones and Others*
1998 (1) SA 83 (W) at 905 E-H:
“I must first
ask whether the exception goes to the heart of the claim and, if so,
whether it is embarrassing to the extent that
the defendant does not
know the claim he has to meet”
Vagueness amounting to
embarrassment and embarrassment in turn resulting in the prejudice
must be shown. Vagueness would invariably
be caused by a defect for
incompleteness in the formulation and is therefore not limited to an
absence of the necessary allegations
but also extends to the way in
which it is formulated. An exception will not be allowed, even if it
is vague and embarrassing unless
the excipient will be seriously
prejudiced if compelled to plead against which the objection lies”
[12]
The nature and extent of exceptions based on the ground that a
pleading is vague and embarrassing
were duly considered by Mc Creath
J in the matter of *Trope*
v South African Reserve Bank and
two others[3] and cited with
approval by Heher J in the matter of *Jowell*
v Bramwell-Jones the
court referred to the following principles pertaining to exceptions:
“(a) Minor
blemishes are irrelevant,
(a)
Pleadings must be read as a whole,
no paragraph can be read in
isolation,
(b)
A distinction must be drawn between
the *facta probanda*, or
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 factual
allegations. Generally
speaking, the latter are matters for

particulars for trial and even then are limited. For the rest, they are matters of evidence,

(c)

Only facts need be pleaded, conclusions of law need not be pleaded,

(d)

Bound up with the last mentioned consideration is that certain

allegations expressly made to carry with them implied allegations and the pleading must be so read:..."

[13]

An exception on the basis that the pleading is vague and embarrassing is also intended to cover

the case where, although a case might

appear from the claim, there is some defect or incompleteness in the manner in which it has

been formulated, resulting in embarrassment to

the defendant. Typically, this type of exception is not directed at a particular

paragraph within a cause of action, but rather goes to the

whole cause of action, as the learned judge correctly observed in the case of *Trope*

v South African Reserve Bank[4].

No

cause of action

[14]

When an exception is raised against the pleading on the basis that it lacks averments necessary

to disclose a cause of action, this implies

that even if one were to accept the factual averments as set out in the pleading is

correct, these factual averments do not justify the

conclusion of law or the relief the pleader intends to reach. It therefore

follows that the defendant cannot plead the defence to a

cause of action which does not exist or is otherwise precluded on any lawful ground. The same position was restated in the constitutional

case in the matter of *Pretorius and Another v Transport Pension Fund*

and others[5],

"[15] in

deciding an exception the court must accept all allegations of fact made in the particulars of claim is true, and may not

have regard to

any other extraneous facts or documents, it may uphold the exception to the pleading only when the excipient has

satisfied the court that

the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that

can be put on the facts. The

purpose of an exception is to protect litigants against claims that

are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.”

[15]

Further, as to pleadings which disclose no cause of action, Griessel J stated in *Frank v Premier Hangers CC*[6]

that:

“ [11] In order to succeed in its exception, the Plaintiff has the onus to persuade the court that, upon every interpretation which the defendant’s plea and counterclaim can reasonably bear, no defence or cause of action is disclosed. Failing which, the exception ought not to be upheld”. This applies with equal force to an exception raised by a defendant to the plaintiff’s particulars of claim.

[16]

Vermeulen

v Goose Valley Investments (PTY)Ltd [7]

Marais JA stated as follows as para [7] page 997:

“ [7] it is

trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it can be shown

that ex facie the

allegations made by the plaintiff and any other document upon which his cause of action may be based, the claim

is

(not

may be) bad in law”

[17]

I now turn to the defendants’ grounds of complaint. Before I do so, I make an observation

that, the manner in which the grounds have

been framed is unnecessarily prolix and borders on being argumentative or a request

for further particulars. The issues raised

therein appear to be crystallised and very crisp and should have been dealt with as

such.

[18]

In order to properly contextualise the gravamen of the excipient’s first ground, is important

to appreciate the formulation of the

particulars of claim under attack. The plaintiff’s particulars

comprise of the main claim (see paragraphs 11 to 14) and an

alternative claim to the main claim (see paragraphs 15 to 23 thereof). The main claim rests on the conclusion of a settlement agreement between the parties, each acting personally and orally agreeing to terminate the partnership and settle all claims between them. Flowing therefrom, certain financial consequences ensued as set out in paragraphs 12.1 to 12.13 of the particulars of claim. Chief among them, the defendant was obliged to make payment to the plaintiff of the settlement amount of R8 million and to transfer his shares in a company known as Future Dev Properties (“the Company”) to the plaintiff.

When this was not complied with by the defendant, the plaintiff instituted payment from the defendant in that amount (together with interest thereon) and as a further order pertaining to the transfer of the 50% shareholding in the company to the plaintiff.

The alternative claim on the other hand, is pleaded as arising from material (mis)representations, which the plaintiff alleges that induced it to partner with the defendant, resulting in the partnership agreement, now terminated. The plaintiff advised that had it been aware of the falsity of the material representations, it would not have entered into the partnership agreement with the defendant. This is a complete and self-standing cause of action. In consequence of the falsity of the material representations made by the defendant, the plaintiff avers that it suffered damages in the sum of R 5 676 520,00 is more particularly set out in paragraphs 19.1 to 19.3 of the particulars. It is my considered view that these damages, quite plainly arise from a different set of facts and circumstances to those on which the main claim is anchored.

[19]

Having sketched the above background, the essence of this ground of exception seems to be erratically based on the contention that “the two claims are mutually destructive and cannot exist in unison if regard is had to the fact that the plaintiff is required to make an election in respect of the respective courses of action, albeit to plead out the basis for the alternative claim” (sic).

Firstly, I do not agree that the plaintiff is under any obligation to make the election as contended for by defendant.

Secondly,
there is no vagueness in how that claim is formulated, let
alone one that could possibly lead to any embarrassment at the
instance
of the defendant. The case that the defendant has to meet is
self-evidently plain and unambiguous. It's main claim is
rooted in the settlement agreement and resultant non-compliance there
with, whereas, the alternative claim is based on material
misrepresentations, the truth of which had it been known to the
plaintiff, the latter would not have
entered into the partnership
agreement.

[20]

The alternative claim is by definition, an alternative (something
other than) what is contended
in the main claim. It therefore flows
that the main in the alternative claim by extension of logic do not
necessarily have to coexist,
to enable a defendant to fully
appreciate the case it is called upon to meet. In both instances, the
material facts are sufficiently
contained in the pleading. Put
differently, the necessary facts which the plaintiff would be
required to prove in order to support
its claim, have been disclosed
in sufficient detail. It is not necessary for every piece of evidence
required to prove each fact
to be pleaded. In *Evidence v Shield*
Insurance Co. Ltd[8] it was said
that "cause
of action... is ordinarily used to describe the factual basis,
the
said of material facts, that begets the plaintiff's legal right
of action". I
align myself with this dictum. [My emphasis]

I

am in full agreement with the plaintiff's counsel when he
contends that the allegations that do not serve to establish the
cause of action would not qualify as being "material".
Further, every pleading shall contain a clear and concise statement
of the material facts upon which the pleader relies for his claim
with sufficient particularity to enable the opposite party to
reply
thereto. In this case I am persuaded that such particularity has
indeed been provided. The defendant misconstrues the full
import of
both the main and alternative claims, resulting in its mistaken view
regarding the election which it argues ought to
have been made by the
plaintiff, as well as the nonexistence "in unison"
argument. It goes without saying that in the

adjudication of the claim, a court would first have to consider the main claim, and in the event that such claim succeeds, there is no need to consider the alternative claim and vice versa. I fail to see on what basis it could ever be argued that the two claims are “mutually destructive”, when coexistence is not a prerequisite. The complaint raised in this ground does not go to the heart of the cause of action as a whole, in respect of both the main and alternatively claim. In the result, this ground of exception falls to be dismissed.

[21]

This ground of exception is directed at paragraph 9 of the particulars. The complaint is rooted in the fact that “the plaintiff has failed to set out particularity on which respective dates such acknowledgement was advanced to allow the defendant to respond thereto sensibly” (sic) as a result of that paucity of detail, according to the defendant, the particulars are vague and embarrassing resulting in its embarrassment to plead thereto and a further consequence being prejudice.

[22]

It is plain that the acknowledgement referred to is oral acknowledgement to the plaintiff by the defendant at Johannesburg and pleaded as “on various occasions following the conclusion of the partnership agreement on or about 29th of the 2 July 2016. The dates have clearly been provided, as well as the place (Johannesburg). Further dates have been particularised in paragraph 9.1, read with para 3.6.3 thereof. The defendant seems to have directed it’s attack on a particular paragraph and not the entire cause of action, considered holistically. In the result, I am at loss to see any demonstrable vagueness leading to embarrassment and prejudice at the instance of the defendant. It is still open to the defendant to request for further particulars. Exceptions are only reserved for instances where the particulars are so vague and embarrassing to a point that it goes to the root of the cause of action, and especially when such cause of action is not clearly set forth in an intelligible manner. Not in a manner that the defendant agrees with. The test is whether or not, based on the pleading as it

currently reads, is the defendant able to decipher the cause of action based on the material facts pleaded, to enable it to know what case it has to meet, not the pieces of evidence required to sustain it. In other words, an exception that a pleading is vague and embarrassing must strike at the formulation of the cause of action and not its validity.[9]

[my emphasis]

[23]

I agree with the plaintiff's counsel that the defendant has failed to indicate why the alleged embarrassment, if any, is so serious that it is unable to plead and is thus prejudiced and further, the particularity which the defendant requires is not capable of being obtained in terms of the quest for further particulars, as I indicated above. Consequently, this ground is unmeritorious and falls to be dismissed.

[24]

This ground is directed at paragraph 12 of the particulars with specific reference to the phrase "the material express, alternatively tacit, further alternatively implied terms" of the settlement agreement. Again, this complaint is ill-conceived as it could easily be dealt with by way of a request for further particulars. In any event, I fail to see why it is embarrassed and able to plead simply because it has not been pleaded which terms were tacit alternatively implied. In such cases, the defendant could simply admit, deny, confess or avoid all those material facts alleged there in, which are in any event sufficiently and intelligibly pleaded. This ground must also fail.

[25]

This ground is directed at paragraph 12.9 which deals with the acquisition of the 3 apartments from Odyssey Luxury Lifestyle, loan accounts to Investec and the sale agreement with one Jarod Kolman on behalf of Odyssey Luxury Lifestyle. The complaint is interestingly couched in the language of the request for further particulars, and correctly so, only if that mechanism was employed, as is indeed open to the defendant to do so. Far from being a ground for exception, this is a classic and textbook case of the formulation of the request for further particulars in terms of Rule 21. At bare minimum, the plaintiff is only required to plead the necessary *facta probanda*

and not the facta probantia, as the latter falls into the category of secondary allegations (pieces of evidence) on which the plaintiff will rely in order to prove its primary allegations, those being matters for trial. This ground of attack is accordingly misplaced.

[26]

I find the pleading in this regard to be concise, intelligible and very apparent. The absence of the information complained of by the defendant does not render the pleading vague and embarrassing, let alone resulting in serious prejudice. This ground of exception is accordingly dismissed.

Costs

[27]

I do not see why costs should not follow the result.

The
order

[28]

I accordingly grant the following order:

28.1

The first to fourth grounds of exception are dismissed.

28.2

The defendant is ordered to pay costs on a party and party scale, including the costs consequent upon the employment of counsel.

Z M P MAJAVU

Acting Judge of the

High Court

Gauteng

Local Division, Johannesburg

HEARD ON:

12 May 2021

JUDGMENT

DATE:

14 May 2021

FOR THE PLAINTIFF:

Adv N Konstantinides SC

INSTRUCTED BY:

Van Hulsteyns attorneys

FOR THE

Adv IL Posthumus

DEFENDANT:

INSTRUCTED BY:

Afzel Seedat Incorporated.

[1]rule 23 (1) provides as follows “where any pleading is vague and embarrassing lacks the averments which are necessary to sustain action or defence, as the case may be, the opposing party may, within the period allowed for failing any subsequent pleading,

deliver an exception thereto...: Provided that where a party intends to take an exception that the pleading is vague and

embarrassing, he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days....”

[2] (7575/2010) [20101] ZAGPJHC 104 (4 November 2010) at paras 4 and 5

[3] 1992(3) SA208(T) at 211

[4]

[1993] ZASCA 54; 1993 (3) SA 264 (A) at 269H

[5] 2019 (2) SA 37 (CC)

[6] 2008(3) SA594 (C)

[7] 2001(3) SA 986(SCA)

[8] 1980[2] as a 814 A at 825G

[9] VENTER and others NNO v Barritt, VENTER and others NNO V Wolsberg Arch Investment 2 (Pty) Ltd 2008 (4SA639 (see) at 643I-644A v

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