

SOUTH AFRICA / JUDGMENT

Jacobs and Others v Companie Francais D'Assurance Pour Le Commerce Ex Terieur and Another (042730/2022) [2023] ZAGPPHC 2019 (11 December 2023)

[2023] ZAGPPHC 2019

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay

CASE / FILE NUMBER

042730/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 042730/2022

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED:

DATE:

11/12/23

SIGNATURE

In

the matter between:

JACOBS
CAPITAL (PTY) LTD
First Respondent
OLD
TEXTILE COMPANY (PTY) LTD
Second Respondent
GCF
HOLDINGS (PTY) LTD
Third Respondent
And
COMPANIE
FRANCAIS D'ASSURANCE POUR First
Excipient
LE
COMMERCE EXTERIEUR
GERRIT
COETZEE INC
Second Excipient

JUDGMENT

TOLMAY J

1. On 1 November 2022, the respondents instituted an action against the first and second excipients jointly claiming repayment of R5 260 000.00 (Five million two hundred and sixty thousand rand) from the first excipient, alternatively second excipient, alternatively from first and second excipients jointly, premised on misrepresentations

made. On 24 January 2023 the first excipient served a notice in terms of rule 23 (1) of the Uniform Rules of Court complaining that the particulars of claim are vague and embarrassing, alternatively lack averments necessary to sustain a cause of action. The respondents were afforded an opportunity to remove the causes of complaint. The respondents failed to remove the causes of complaints and notices of exception were filed by both excipients.

2. The excipients raised four complaints that the particulars of claim are vague and embarrassing and the second excipient raised two additional complaints that the particulars of claim lack necessary averments to sustain a cause of action.
3. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*[1], it was emphasized that exceptions should be dealt with sensibly as an "over technical approach destroys their utility" and pleadings "... must be read as a whole and in deciding exceptions a court is not playing games and blindfolding itself"[2]. In considering whether particulars of claim are vague and embarrassing, the court should firstly in each case consider whether

the pleading does lack particularity to the extent that it is vague and secondly whether the vagueness causes embarrassment to such an extent that the excipient is prejudiced[3]. A statement is vague if it is either meaningless or capable of more than one meaning.

4. It is trite that exceptions based on a complaint that the particulars of claim are vague and embarrassing strikes at the formulation of a cause of action, due to the fact that it is not sufficiently detailed

or lacks clarity. The onus is on the excipient to establish vagueness causing embarrassment and prejudice. The test is whether the vagueness and embarrassment are sufficiently serious as to prejudice the excipient should he be required to plead to the pleading[4]. The enquiry is "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. "[5].

5. The second excipient raised two additional complaints on the basis that the particulars of claim lack averments, necessary to sustain a cause of action. In order to succeed, the excipient has the duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed, and that the plaintiff is confined to the facts alleged in the particulars of claim[6].
6. The first complaint is that the first respondent alleged that " the plaintiffs, jointly effected payment of the sum of R5 260 000,00 ". The excipients argued that they were cited as three independent entities, each being a distinct juristic person and one of them was in liquidation. No particulars were furnished of the basis upon which these three independent entities made a joint payment, in as much as payments would under these circumstances in general be made by an individual entity. It was correctly argued that the excipients are unable to determine whether such payment had actually been made by all three respondents simultaneously and/ or by one respondent acting on behalf of all respondents and/ or one respondent to the joint credit of all three respondents and/ or otherwise. The excipients are indeed unable to determine the locus standi of each of the respondents to make claim and the quantum of such claim. Applying the principles set out above, the exception relating to the first complaint should be upheld.
7. The second complaint is that no particulars are furnished in respect of the alleged payment of the amount referred to above. No information is provided regarding who exactly made the payment, the manner in which the payment was made and all the amounts and dates on which the payments were made. The excipients are unable to identify the payment and properly respond to the allegation and are therefore unable to consider the locus standi of each of the respondents to jointly claim the refund. This complaint is justified as the way in which the claim is formulated makes it virtually impossible to plead

to it and renders the pleading vague and embarrassing. As a result, this exception should be upheld.

8. The third complaint is that the excipients allege that the respondents rely on a misrepresentation made by the second excipient that the second respondent is indebted to Pacific International Financial TW (Pacific). The allegation is then made that the misrepresentation caused the second respondent to sign a written acknowledgement of debt (AOD) in favour of Pacific. In paragraph 27 of the particulars of claim, it is alleged that the payments were made to the excipients in compliance with the AOD contained in annexure "SOC1" and not as a result of the misinterpretation. In addition, a payment jointly made by the three respondents is alleged, with no such misrepresentation alleged in respect of the first and the third respondents. The excipients allege, correctly, that they are unable to determine and identify the causal link between the misrepresentation of indebtedness owed to Pacific, the payments made to the excipients and/ or first and third respondents in respect of whom no misrepresentation is alleged. The exception on this ground should therefore also be upheld.
9. The fourth complaint is that the respondents rely on a misrepresentation by the second excipient that first respondent is indebted to Pacific. The respondents then continue to allege that this misrepresentation caused the first respondent to sign an AOD in favour of Pacific. The respondents however, for this cause of action and claim for damages in paragraph 27, rely on payments made to the excipients in compliance with the obligations assumed by the first respondent owed to Pacific in terms of the AOD as set out in "SOC3". The causal link between the misrepresentation of indebtedness owed to Pacific and the payment made to the excipients and/ or third respondent, in respect of whom no misrepresentation is alleged cannot be determined. This renders the particulars of claim vague and embarrassing. This exception should also be upheld.
10. The fifth complaint is that it is alleged that the second excipient at all relevant times acted as the representative or agent of the first excipient. An agent or representative can generally not be sued on the principal obligation between its principal and the other parties[7]. In the particulars of claim, no averment at all is made to constitute a basis for the second excipient's alleged personal liability towards the respondents. Accordingly, the particulars of claim lack averments necessary to sustain a cause of action against the second excipient and the exception on this ground should be upheld.
11. The sixth complaint is that in the particulars of claim, the respective respondents claim that they were persuaded by misrepresentations made by the second excipient as agent/ representative of the first excipient to enter the AOD's and/ or the deeds of suretyships. In paragraph 30 of the particulars of claim, it is however alleged that second excipient, who is cited as a firm of legal practitioners, negligently made the aforementioned misrepresentation independently and not only as the representative of the first excipient.
12. In order to make out a cause of action on the basis of negligent misrepresentation, the respondents must allege and prove that the representation or statement:

12.1 Was false.

12.2 Was wrongful. The test for wrongfulness is whether the first excipient had a legal duty not to make a misrepresentation to the respondents[8].

12.3 Was made negligently.

12.4 Caused the respondents patrimonial loss, provided that the damages are not too remote.

12.5 The extent of the damages.

In this instance none of the aforesaid allegations are made in the particulars of claim.

A perusal of the particulars of claim leaves one with a sense of confusion as to what exactly constitutes the cause of action and the exact nature of the claim against the excipients. I am satisfied that the complaints are not merely technical and that no proper

interpretation of the particulars of claim as it is presently formulated would place the excipients in a position to respond effectively and appropriately to it. For the reasons set out above the exception should be upheld with costs and the respondents should be given an opportunity to amend their particulars of claim.

The following order is made:

- 1) The first and second excipients' exceptions are upheld.
- 2) The respondents' particulars of claim dated 1 November 2022 is set aside.
- 3) The respondents are granted leave to amend their particulars of claim within 30 days from date of this order.
- 4) The respondents are ordered to pay the costs of the excipients jointly and severally, the one paying the other to be absolved, which costs will include the costs of senior counsel where applicable.

R G TOLMAY

JUDGE OF THE HIGH COURT

Appearances:

For Respondents: Adv AJ Troskie SC Cox Yeats Attorneys For First Excipient: Adv JJ Pretorius Asif Kaka Attorneys For Second Excipient: Adv JP Van Der Berg SC Ditsela Incorporated Date of Hearing: 7 September 2023 Date of Judgment: 11 December 2023

[1] 2006 (1) 461(SCA) at para 3.

[2] Ibid at para 10.

[3] Trope v South African Reserve Bank and two other cases 1992 (3) SA 208 (T) at para 211AC. See also Gallagar Group Ltd. V IQ Tech Manufacturing (Pty) Ltd and Others 2014 (2) SA157 (GNP) at para 5455.

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- [4] Footnote Absa Bank Ltd v Boksburg Transitional Local Council 1997
(2) SA 415 (WLD) at 421422B.
- [5] Jowell v BramwellJones and Others 1998 (1) SA 836 (W) at 90SEH.
- [6] First National Bank v Thompson 2001(3) SA 960(SCA) par.6 Vaidman N.O v EMI Music Publishing SA(Pty) Ltd 2010 (1) SA 1(SCA) at para 7).
- [7] SWA Amalgameerde Afslaers (Edms)Bpk v Louw 1956 (1) SA 346 (A).
- [8] Standard Chartered Bank of Canada v Netperm Bank Limited [1994] ZASCA 146; 1994 (4) SA 747 (A).
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