

SOUTH AFRICA / JUDGMENT

## Kramer Weihmann Incorporated v Joubert and Others (3645/2022) [2024] ZAFSHC 374 (25 November 2024) [2024] ZAFSHC 374

COURT

Free State High Court, Bloemfontein

BEFORE

NG Gusha

CASE / FILE NUMBER

3645/2022

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### Source record

IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no:3645/2022

In

the matter between

KRAMER

WEIHMANN INCORPORATED

PLAINTIFF

and

PETRUS

JOHANNES JOUBERT

FIRST

DEFENDANT

CW

AUDITORS

SECOND

DEFENDANT / FIRST EXCIPIENT

CHRISTIAAN

WAGENAAR

THIRD

DEFENDANT / SECOND EXCIPIENT

THE

HOLLARD INSURANCE COMPANY LIMITED

FOURT

DEFENDANT / THIRD EXCIPIENT

JACQUELINE

SYNTHIA FREDERICKS

FIFTH

DEFENDANT

Neutral citation: XXX

Coram: NG Gusha AJ

Heard: 23 August 2024

Delivered: 25 November 2024

Summary: Exception – claim for damages upon breach of contract – whether the plaintiff’s amended particulars of claim sustain a cause of action.

ORDER

The exceptions are dismissed with costs on scale C, of which costs shall include the costs of two counsel where so employed.

## JUDGMENT

Gusha AJ

### Introduction

[1] This is an interlocutory application by the second to fourth defendants who raise an exception against the plaintiff’s amended

particulars of claim dated 18 October 2023 (the 18 October 2023 amendments)[1], on the ground that same does not disclose sufficient grounds to sustain a cause of action against the second and third defendant

jointly and the fourth defendant on the other side.

[2] The second and third defendants (first excipients) jointly excepted to the amended particulars of claim. The fourth defendant (second excipient) excepted apart.

The parties

[3] The plaintiff is duly registered as a personal liability company with its registered place of business situated at 24 Barnes Street, Westdene, Bloemfontein, Free State. The plaintiff was previously registered and known as Kramer Weihmann Joubert Incorporated (KWJ). It conducts business as a professional company of attorneys, notaries and conveyancers as provided for by the Legal Practice Act 28 of 2014.

- [4] The first defendant is a male and duly admitted legal practitioner with principal place of business alternatively at employed at Peyper Attorneys 101 Olympus Drive, Helicon Heights, Bloemfontein, Free State. He is a founding member of KWJ. For purposes of the action as instituted, the first defendant was at all relevant times a director of the plaintiff and is therefore together with the plaintiff jointly and severally liable for the debts and liabilities of the plaintiff as are or were contracted during his period of office which subsisted from 1998 until his resignation on 1 April 2020.
- [5] The second defendant is a personal liability company duly registered as a firm of auditors in terms of the Auditing Profession Act 26 of 2005. It has its place of business at 50 Reid Street, Westdene, Bloemfontein, Free State. At all times relevant to the action, the second defendant rendered auditing services to the plaintiff.
- [6] The third defendant is a registered chartered accountant and auditor, and a director of the second defendant.
- [7] The fourth defendant is an insurance company and financial services provider duly registered as such with its principal place of business at Hollard Villa, Arcadia, 22 Oxford Road, Parktown, Gauteng. At all times relevant to the action, the fourth defendant was the registered insurer of the plaintiff as per the written agreement of insurance entered into between the two entities in 2018.
- [8] The fifth defendant is a female and is employed at Pillay Jampies Attorney's Inc. At all times relevant to the action, the fifth defendant was employed by the plaintiff as a senior conveyancing secretary and reported to the first defendant who was the principal of the plaintiff's conveyancing department.
- [9] The first and the fifth defendants are not part of the present proceedings.

#### Background facts

- [10] It is apposite to first set out the background to the present proceedings. The plaintiff instituted a claim against the defendants,

jointly and severally, for damages suffered by the plaintiff as a result of misappropriation of trust funds by the first and fifth

defendants. The respective claims are more fully set out in the erstwhile particulars of claim (the original particulars of claim).[2]

- [11] It appears on the papers that some amendments, which were also excepted to, were effected on the original particulars of claim. The series of amendments and exceptions culminated in the 18 October 2023 amendments which are the subject of these proceedings. Upon receipt of these amended particulars of claim, the second and third defendants jointly excepted and the fourth defendant on the other side also excepted. Both exceptions were taken on the basis that the 18 October 2023 amendments lacked averments necessary to sustain a course of action, more on this later.

## The exceptions

### The exception by the first excipients

[12] In amplification of the exception that the 18 October 2023 amendments lack the necessary averments to sustain a course of action, the first excipients aver that ex facie the amended particulars of claim, the claimed amount is made up of monies fraudulently or otherwise misappropriated from trust depositors and not from monies to which the plaintiff itself was entitled. The first excipients aver that consequently the amended particulars of claim lack the necessary averments to support the claim that the plaintiff suffered damages in the claimed amount and accordingly lacks the necessary averments in respect of the material facta probanda to support its claim for damages based upon breach of contract.

### The exception by the second excipient

[13] The second excipient's exception is based on the ground that in so far as the plaintiff seeks as specific performance of an indemnity insurance contract payment from it, the plaintiff enjoys indemnity insurance cover for legal liability for damages arising out of the conduct of the profession, legal liability incurred in the reimbursement of entrusted money and finally for direct financial loss due to dishonest acts. It avers further that in terms of the provisions of the insurance contract in respect of which plaintiff seeks specific performance, the plaintiff has an obligation to take all practicable steps to recover the lost or stolen property.

[14] It further avers that the amended 18 October 2023 particulars of claim lack averments that the plaintiff was legally liable for the damages arising out of the conduct listed above and that the plaintiff complied with its legal obligation to take all practical steps to recover the loss.

[15] Both exceptions were enrolled and set down for hearing on 23 August 2024.[3] Subsequent to this, the plaintiff substituted its attorneys of record. On 25 June 2024, whilst the exceptions were already enrolled for hearing, the plaintiff once more gave notice of its intention to amend its 18 October 2023 particulars of claim. The notice to amend was delivered on 25 June 2024 and the amendments delivered on 17 July 2024 (the 17 July 2024 amendments).[4]

[16] The excipients asserted that this step by the plaintiff constitute an irregular step as envisaged by rule 30 and accordingly served a notice in terms of rule 30(2)(b) in response to the plaintiff's notice to amend its 18 October 2023 particulars of claim.[5] They assert that the plaintiff was not entitled to amend its particulars of claim whilst the exceptions thereto were still extant.

They assert further that as an exception is a pleading it cannot in law be nullified or ignored. Once an exception has been enrolled for adjudication, the particulars of claim excepted to can only be effected with the leave of the court or by agreement between the parties, none of which, according to the excipients has occurred.

- [17] The plaintiff asserts that the 17 July 2024 amendment was directed exclusively to the plaintiff's claim as against the fourth respondent. It further asserts that the aforesaid amendment was duly effected in terms of Rule 28 in that the defendants did not deliver an objection as contemplated in the Rules. As a result, so they assert, the defendants are deemed to have consented to the amendment.
- [18] In addition to the plaintiff submitting that the 17 July 2024 amendment was effected in terms of the rules, it submits that the excipients are not entitled to raise their objection to the latest amendments in their heads of argument. To buttress this assertion, the plaintiff submits that the excipients are bound by the pleaded grounds of the exception and that the exceptions as taken and pleaded cannot be upheld on grounds not specifically pleaded. Accordingly, the plaintiff submits, that the excipients are not entitled to broaden and supplement the grounds of exception in the heads of argument.
- [19] With regards to further submissions made, I am indebted to counsel for their extensive heads of argument traversing their submissions as well as the authorities they referred me to. For that reason and in order to avoid prolixity I shall not repeat same here save to refer thereto, where appropriate, during the course of this judgment.

#### The applicable legal principles

- [20] It is a basic rule that pleadings 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 therein. In this regard rule 18(4) 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.'

- [21] It is trite that an exception is a legal objection to a pleading. It complains of a defect inherent in a pleading,[6] admitting for the moment that all allegations contained in the particulars of claim are true. An exception asserts that, even with

that admission, the pleading does not disclose a cause of action. It presupposes that the case is without legal merit on the basis of the defects identified. Where an exception is taken a court looks only to the pleading excepted to as it stands not to facts outside those stated in it.[7]

- [22] It is furthermore trite that the excipient bears the onus to prove that an exception is excipiable upon every interpretation which the pleading in question can reasonably bear. In *First National Bank of Southern Africa Ltd v Perry N.O.*[8] the court held where a matter is decided as on exception, this has two relevant consequences. The excipients have to show that the pleading is excipiable on every interpretation that can reasonably be attached to it: Then, the plaintiff, is confined to the facts alleged in the particulars of claim, apart from any further facts which the parties agreed at the trial might be considered.

[23] It needs no restating that 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.[9] It is not directed at a particular paragraph within the cause of action but goes to the entire cause of action. In addition, it is trite that when a court adjudicates an exception it should do so sensibly and avoid an over-technical approach.[10]

[24] In *Luke M Tembani and Others v President of the Republic of South Africa and Another*[11] the court held that whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless

necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out, it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.

[25] In *Cronje and Others v Firststrand Bank Ltd t/a First National Bank*[12] my brother Daffue J restated the law as follows:

'It is trite that a charitable test is applied in adjudicating an exception, especially in deciding whether a cause of action has been established. The excipient must prove that the pleading is excipiable on every interpretation that can reasonably be attached to it.

In order to consider an exception, the court should accept the allegations pleaded by the plaintiff as true and correct to assess whether they disclose a cause of action. An over-technical approach must be avoided. As stated in *Delmas Milling Co Ltd v Du Plessis*, confirmed in *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd*, the validity of an agreement and the question whether a purported contract may be void for vagueness do not regularly fall to be decided by way of an exception.' (Footnotes omitted.)

### Application of the Legal principles

#### The 17 July 2024 amendment

[26] Rule 28 deals with amendments to pleadings.[13] The rule is intended to regulate the amendment of pleadings and documents in respect of which the parties' procedural rights in proceedings may be affected. The rule is an enabling rule and amendments should generally be allowed unless there is good cause for not allowing an amendment.[14] The notification requirement in rule 28(1) grants the other party to the proceedings an opportunity to object to the intended amendment under the provisions of rule 28(4).[15] Objections customarily arise if a party may be prejudiced in the conduct or outcome of the

proceedings because of the amendment or its timing. The defendants in the present matter did not so object as provided for in the rules, therefore in terms of rule 28(5) they are deemed to have consented to the amendment. It is also illuminating that this objection was only raised in the heads of argument and not specifically pleaded, the defendants re bound by their pleaded case in their exception, they cannot broaden the grounds in their heads of argument.

[27] The principles governing the granting or refusal of an amendment have been expounded in several cases.[16] The key principles evident in these cases were also echoed by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*.[17]. Referring with approval to *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29, the court, in para 9, indicated that:

'The practical rule that emerges . . . is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or "unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed".'

The pleaded cause of action in both the 18 October 2023 and 17 July 2024 amended particulars of claim

[28] In both these amended particulars of claim, the plaintiff's cause of action as against the first excipients is based on damages suffered resulting from breach of contract. The expression 'cause of action' has been held to mean;

'[E]very fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise of every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'[18]

[29] This definition postulates that facts should be pleaded, not evidence, and only the material facts should be pleaded with clarity and conciseness. This requires of a party to formulate its case according to the basic rules of pleadings. A general rule is that pleadings must be lucid, logical and intelligible.[19] Pleadings serve the purpose of bringing clarity, to the notice of the court and to the parties in an action, the issues upon which reliance is to be placed. This objective can only be attained when parties state their cases with precision, the degree of which depends on the circumstances of each case.[20] In *Jowell v Bramwell-Jones and Others*[21] the court remarked that

'[T]he plaintiff is required to furnish an outline of its case. That 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 [of the rule].'[22]

[30] It is trite that pleadings are about primary factual allegations, the *facta probanda*, from which conclusions may be drawn. The *facta probanda* has to be distinguished from the *facta probantia*, which are secondary allegations or evidence upon which the pleader will rely to prove the primary allegations.[23] It is accepted law that it is not necessary to plead *facta probantia*,[24] a pleading should not be read pedantically nor should a court overemphasise precise formalistic requirements – it is the

substance of the allegations that should properly be considered.[25]

[31] In the present matter the plaintiff alleged in its particulars of claim that it suffered damages as a result of the misappropriation of trust funds by the first and fifth defendants. the claim as against the defendants is couched in sufficient detail to allow the defendants to respond thereon. The plaintiff has set out in its particulars of claim the contractual and trust relationship, the breach of that relationship, how it came about, as well as the relief it seeks. It is accordingly not necessary under these circumstances for the plaintiff to set out the defendants’ liability as the facts the defendants rely upon to negate their liability are facts falling outside the realm of the plaintiff’s cause of action.

[32] The fact that the amount misappropriated was that of third parties is really of no moment in the determination of whether the plaintiff has suffered damages, for it is a trite principle of our law that where trust moneys are deposited in the trust account of an attorney, the trust creditors have no control over the trust account: ownership of the money in the account vests in the bank in which it is deposited. It is only the attorney who is entitled to operate on the account and to make withdrawals from it. The only right that the trust creditors have is the right to payment by the attorney of whatever is due to them, and to that extent they are creditors of the attorney. The right to payment plainly arises from the relationship between the parties and has nothing to do with the way in which the attorney handles the trust funds. A trust creditor’s claim is not limited to what the attorney has unlawfully withdrawn or whatever is left in the trust account. When an attorney receives money from a client to be held in trust, a debt immediately arises for payment (subject to whatever agreement the parties may have) of that amount to the client. The client becomes entitled to payment on demand.

[33] When trust money is handed to an attorney or a firm of attorney’s it is the duty of that attorney or firm to keep the funds in its possession and to use it for no other purpose but that of the trust. The firm fulfills its duty if it accounts for or returns an equivalent amount. It is inherent in such a trust that that the firm should at all times have available liquid funds in an equivalent

amount. If a deficit exists in respect of trust money for which a practitioner is liable, the practitioner has no right to use moneys entrusted to her for a particular purpose, to satisfy trust creditors in respect of whose moneys the deficit exists.[26]

The second exception relating to the indemnity insurance contract

[34] It is trite that a claim for indemnification insurance under an insurance contract can only arise when liability to the third party in a certain amount has been established. The debt, for purposes of prescription, therefore, becomes due when the insured is under a legal liability to pay a fixed and determinate sum of money. Until then a 'claim' for indemnification under the policy does not exist, it is only a contingent claim. In the present matter the plaintiff had suffered a trust deficit as a result of the misappropriation and has already made good on some R4 million to the trust depositors, the fact that the entire deficit was not made good is of no moment, the moment a trust deficit ensued, in my view the obligation to pay arose, the plaintiff suffered patrimonial loss; the element of damages suffered is established.

## Conclusion

[35] Accordingly, the exceptions as raised should fail.

### Costs

[36] The parties are agreed that an appropriate costs order to make is that of party and party costs at scale C, I see no reason to depart therefrom.

### Order

[37] Resultantly, I make the following order:

The exceptions are dismissed with costs on scale C, of which costs shall include the costs of two counsel where so employed.

NG GUSHA, AJ

Appearances For the Plaintiff: Adv. D.J Van der Walt SC et Adv. H Benade Instructed by: Clyde & Co Inc Sandton c/o Honey Attorneys Bloemfontein For the Excipients: Adv. G.F Heyns SC Instructed by: Peyper Attorneys Sandton c/o Peyper Attorneys Bloemfontein

[1] Pleadings bundle p.104 to 210.

[2] Ibid at p.7 to 46.

[3] Notice of set down, p. 62 to 65 Exception Bundle.

[4] Pleadings bundle p. 211 to 218.

[5] '30. Irregular proceedings

(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if— (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity; (b) the applicant has, within 10 days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within 10 days; (c) the

application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).'

[5] '30. Irregular proceedings

(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if— (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity; (b) the applicant has, within 10 days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within 10 days; (c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).'

[6] '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.'

[6] '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.'

[7] Baliso v Firststrand Bank Limited t/a Wesbank

[2016] ZACC 23; 2016 (10) BCLR 1253 para 33.

[8] First National Bank of Southern Africa Ltd v Perry N.O

[2001] ZASCA 37; 2001 (3) SA 960 (SCA) para 6.

[9] Trope v South African Reserve Bank 1992 (3) SA 208 (T).

[10] Telematrix (Pty) Limited v Advertising Standards Authority SA 2006 (1) SA 461 SCA.

[11] In Luke M Tembani and Others v President of the Republic of South Africa and Another

[2022] ZASCA 70 para 14.

[12] Cronje and Others v Firststrand Bank Ltd t/a First National Bank

[2023] ZAFSHC 441 paras 11-12.

[13] '28. Amendment of pleadings and documents

- (1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded
- (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7). . . .’

[13] ‘28. Amendment of pleadings and documents

- (1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded
- (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).

. . .’

[14] Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others

[2019] ZACC 41; 2020 (1) SA 327 (CC) para 89.

[15] Ibid.

[16] See for instance Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (TK) at 76D-76I. See also Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another

[1990] ZASCA 47; 1990 (3) SA 547 (A) at 565G-566A.

[17] Affordable Medicines Trust and Others v Minister of Health and Others [2005] ZACC 3; 2006 (3) SA 247 (CC)

[18] Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838D-H.

[19] Trope v South African Reserve Bank and Another 1992

(3) SA 208 (T) at 210H.

[20] Imprefed (Pty) Ltd v National Transport Commission 1993

(3) SA 94 (AD) at 107C-E.

[21] Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) (Jowell).

[22] Ibid at 913F-G.

[23] Nasionale Aartappel Korporasie Beperk v Price Waterhouse Coopers Ing en andere 2001 (2) SA 790 (T) at 797G-I and 798C-E; Jowell at 903A-B; and Makgae v SentraBoer (Koöperatief) Bpk 1981 (4) SA 239 (T) at 245D-E.

[24] Harms: Amler's Precedents of Pleadings 9 ed at 1.

[25] MN v AJ [2011] ZAWCHC 5; 2013 (3) SA 26 (WCC) para 24; and Suid Afrikaans Onderlinge Brand en Algemene Versekerings Maatskappy Bpk v Van der Berg en Andere 1976 (1) SA 602 (AD) at 607E.

[26] Incorporated Law Society, Transvaal v Visser and Others; Incorporated Law Society, Transvaal v Viljoen 1958

(4) SA 115 (T) at 118F-H.

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Prepared on 9 October 2026 · Esheria