

SOUTH AFRICA / JUDGMENT

# Ngxito and Another v Minister of Police and Another (1391/2019) [2021] ZAFSHC 82 (18 March 2021) [2021] ZAFSHC 82

## COURT

Free State High Court, Bloemfontein

## BEFORE

AS Boonzaaier

## CASE / FILE NUMBER

1391/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,  
FREE  
STATE DIVISION, BLOEMFONTEIN

Reportable:

NO  
Of Interest  
to other Judges: NO  
Circulate to  
Magistrates: NO  
Case  
Number: 1391/2019  
In

the matter between:

MAWETHU  
NGXITO  
1st  
Plaintiff  
SIVUYILE  
XHANTINI  
2nd Plaintiff  
and  
MINISTER  
OF  
POLICE  
1st Defendant  
MOHOKARE  
LOCAL MUNICIPALITY  
2nd  
Defendant

CORAM: AS BOONZAAIER AJ  
HEARD

ON: 05 MARCH 2021

## JUDGMENT

BY: AS BOONZAAIER AJ

DELIVERED ON: 18 MARCH 2021

## INTRODUCTION:

- [1] This is an application in terms of Rule 23(1) of the Uniform Rules of Court (“the Rules”) for the upholding of exceptions taken against the particulars of claim on the basis that same is vague and embarrassing.[1]
- [2] The Plaintiffs already amended their particulars of claim pursuant to a Rule 23(1) notice in terms of the rules, to cure by the Defendant. Subsequent to the said amendment being effected by the Plaintiffs, Defendant served a further Rule 23(1) notice to cure which has lead to this exception.

## THE EXCEPTION:

- [3] In the main, the 2nd Defendant complains that the Plaintiffs` particulars of claim to the summons are vague and embarrassing, amongst others, for want of non- compliance with the provisions of Rule 18 (4) of the Rules.[2]
- [4] It will be beneficial to firstly identify the complaints and then thereafter to evaluate the formulation of the plaintiff’s claims taking into consideration the complaints. The Defendant’s complaints as articulated in its Rule 23(1) notice to cure and which forms the basis of its exception, are as follows:

### 4.1 Plaintiffs in paragraph 5 of the Particulars of Claim plead that:

- i. “The Plaintiffs are the de facto owners, alternatively lawful possessors of the farm situated at no.366 Waterloo farm, district of Zastron, by virtue of being the lawful beneficiaries of the Ngxito Trust no. IT 1689/2002”

ii. Plaintiffs further and at paragraph 16 plead that:

*“Notwithstanding the demand, the first and second Defendant have failed, refused or neglected to pay the said amount or any portion thereof, for Plaintiffs` damages and losses”*

- iii. Plaintiffs have consequently failed to plead the material facts upon which Plaintiffs are the deemed alternatively in- fact owners, alternatively, risk bearers with regards to the property held by the Ngxito Farming Trust.

iv. As such Plaintiffs failed to establish locus standi to bring this action and consequently Plaintiffs's particulars of claim fail to sustain a complete cause of action.

v. Furthermore, Plaintiffs fail to establish and plead the required facta probanda to support any claim for damages as alleged by Plaintiffs and as such in a defective and incomplete manner without alleging a valid basis of ownership, failed to plead the material facts required to sustain a complete cause of action.

4.2 Plaintiffs at paragraph 7 pleads that:

*“On or about 22 November 2017, the members of the South African Police Services, the first Defendant and the Second Defendant's employees, went to the Plaintiffs farm at Waterloo farm, no. 36, Zastron, 9950 and cut up the Plaintiffs' fence where all the Plaintiffs' livestock was safely kept and this resulted to the Plaintiffs' loss of their livestock at the instance of both Defendants”*

i. Plaintiffs therefore failed to plead the clear and concise facts upon which Plaintiffs rely to claim damages against Second Defendant and as such failed to establish locus standi and therefore Plaintiffs' Particulars of Claim are vague and embarrassing and furthermore, fails to sustain a complete cause of action.

4.3 The Plaintiffs in paragraph 12 of the Particulars of Claim pleads that:

as a result of the unlawful conduct of the Defendant's employees the Plaintiffs' moveable property was misplaced and damaged.

i. Plaintiffs plead a conclusion of law without pleading the material averments required to sustain the cause of action.

ii. The statement by Plaintiffs is furthermore mutually destructive due to the averments of the property being misplaced and damaged without pleading same in the alternative.

iii. Consequently Plaintiffs averments are vague and embarrassing and lacks the particularity that will allow the second Defendant to properly plead thereto.

iv. Plaintiffs furthermore fail to plead the grounds on which the movables have been lost or damaged and consequently failed to prove all the material facts and surrounding circumstances which should sustain such cause of action.

4.4 Plaintiff furthermore at paragraph 12 pleads that:

the Plaintiffs suffered damages in the amount of R 456 000,00 which is for the replacement of household movables, the replacement of farming equipment as well as the replacement of livestock.

i. Plaintiffs failed to plead with sufficient particularity the grounds and /or basis for their claim of damages against the Second Defendant in that no nexus is drawn to the loss or damages suffered.

ii. Therefore, Plaintiffs failed to plead the material facts and surrounding circumstances which give rise to cause of action and as such Plaintiffs' particulars of claim do not sustain a complete cause of action.

iii. The Plaintiffs do not provide a description of the age, alternatively year, alternatively model of the movables which prevents second Defendant from reasonably establishing and /or assessing the quantum of Plaintiffs' claim

iv. Plaintiffs averments are therefore vague and embarrassing and consequently lacks the particularity that will allow the Second Defendant to properly plead thereto.

4.5 Plaintiffs' ad paragraph 15 furthermore pleads that:

the Defendants failed to protect Plaintiffs' rights, failed to take reasonable steps to prevent injury to Plaintiffs' property, failed to protect Plaintiffs' fundamental rights to human dignity, infringe and caused impairment to Plaintiffs' possession and ownership of their properties.

i. Plaintiffs failed to plead the existence of a legal duty or otherwise which rests upon second Defendant and furthermore failed to plead any fact which gives rise to or would give rise to such a legal duty.

ii. Furthermore, Plaintiffs in a defective manner further failed to plead the basis for a claim based on negligence or intent and as such no causal link between the damages suffered and the legal duty, if any, resting on Second Defendant have been pleaded nor established.

iii. Consequently, Plaintiffs failed to plead the material facts to sustain a cause of action based on an omission, and or a breach of a legal duty.

iv. The Plaintiffs did not set forth in its Particulars of Claim the requisite material averments to sustain any cause of action.

v. In the premises the Plaintiffs' Particulars of Claim do not comply with the provisions of Rule 18(4) of the Uniform Rules of Court, lack averments which are necessary to sustain a complete cause of action against Second Defendant and consequently does not disclose a cause of action.

4.6 Furthermore, the Second Defendant is embarrassed by the aforesaid averments and cannot respond and plead to the Plaintiffs' Particulars of Claim as the Second Defendant is unsure on what basis and or grounds damages are claimed as well as the manner in which they are computed.

4.7 It is essential to understand the Defendant's true complaint as it emerged during argument of the matter. What the Defendant in fact complains of is that the Plaintiffs do not have any locus standi and there is no cause of action, which goes to the root of the application.

4.8 In argument counsel for 2nd Defendant submitted that the Plaintiffs' claimed to be the beneficiaries and true possessors but in casu there is a trust involved. The trustees therefore need to be cited, this being vague and embarrassing and therefore excipiable to by means of an Exception.

#### THE PLAINTIFFS RESPONSE:

- [5] The plaintiffs, in response, denied that the averments in the particulars of claim are vague and embarrassing. Plaintiff is of the contention that the particulars are translucently clear to enable the 2nd Defendant to plead. They further submit that the 2nd Defendant is somewhat remiss, delinquent and mischievous. The 2nd Defendant avoiding having to plead and basing same purely on flimsy grounds. The Plaintiffs are residing on the land which belonged to their ancestors. They live on the said land and they have ownership off the goods involved.
- [6] In essence, Plaintiffs are of the contention that the 2nd Defendant can apply Rule 35 of the Rules to obtain further information or documentation.
- [7] Plaintiffs further submitted that the exception raised in paragraph 7 is misplaced, it is a matter of evidence which should and can be led during a trial. If the Defendant is of the contention that the plaintiffs do not have locus standi it must be pleaded by means of a Special Plea or a point in limine.
- [8] Plaintiffs are further of the contention that the exception raised in paragraph 12 is "fatally baseless". 2nd Defendant is able to plead and should follow the provisions as envisioned and set out in Rule 35.
- [9] The exception in paragraph 16 does not bar the 2nd Defendant from pleading and such pleading "succinctly and substantially" encapsulates the cause of action.

#### THE LAW

The Principles relating to exceptions:

- [10] Rule 23 of the Rules provides a Defendant with an avenue of excepting to the plaintiffs' particulars of claim on two possible grounds. The first ground is where the pleadings are vague and embarrassing and the second ground is where the pleadings do not carry sufficient facts to sustain a cause of action.
- [11] A successful challenge of vague and embarrassing pleadings would result in the said pleadings having to be amended to provide particularity required by Rule 19. The case and the pleadings still remain extant as between the parties.
- [12] In support of the above, Olivier AJ in *Giant Leap Workspace Specialists (Pty) Ltd v Scoin Trading (Pty) Ltd t/a The South African Gold Coin Exchange*[3] had the following to say:

*"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 also in this regard *Jowell v Bramwell-Jones and Others*.”

*“If the defendant knows which claim it must meet, the particulars of claim cannot be vague and embarrassing, and the exception cannot be upheld. 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*

[13] It is explained in *Quilan v Mac Gregor*[4] 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. The judge goes further:

*“Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise, to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing -”.*

[14] 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.

[15] In *Trope supra* the court held that the ultimate test is still whether the pleading complies with the requirements of Rule 18(4).

The material

### facts:

[16] The material facts whereon plaintiffs rely should be concisely stated in their particulars of claim and these facts only, no other facts should be pleaded.

[17] The material facts do not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

[18] The Defendant stated the need to distinguish between *facta probanda* and *facta probantia* is a further aspect of the requirement that material facts only be pleaded. See *Makgae v Sentraoer Kooperatief Bpk*[5]. *Facta probanda* should be distinguished from “pieces of evidences” [*facta probantia*] required to prove the true *facta probanda*. *King's Transport v Viljoen*.[6]

[19] It is also trite law that for purposes of deciding an exception, the Court would consider the facts alleged in the pleadings as correct[7] unless they are palpably untrue or so improbable that they cannot be accepted.[8]

[20] The purpose of the exception procedure is inter alia to remove the need for guesswork. The judgment in Imprefed [Pty] Ltd v National Transport Commission[9] serves as a useful point of departure in analysing this requirement.

[21] The object of pleading is to ascertain definitively what is the question at issue between the parties as it was confirmed in Durbach v Fairway Hotel Ltd.[10]

*“The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.”*

Vague and embarrassing:

[22] It may be possible to plead to particulars of claim by simply denying the allegations made, yet such a pleading would itself be excipiable as being vague and embarrassing. Same would defeat the whole purpose of pleadings to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed.

[23] In casu the excipient is correct that he has a duty to persuade the

Court that the pleading is excipiable on any interpretation that can be attached to it.[11] In Picbel Groep Voorsorgfonds (in liquidation) v Somerville, and Related Matters this duty was confirmed.

[24] The pleading must be looked at as a whole as mentioned in[12] Nel and Others NNO v Mac Arthur.

[25] An exception that the pleading is vague and embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged. [13]Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd . The effect of this argument is that the exception can only be taken if the vagueness relates to the cause of action.[14] Keely v Heller [Emphasis provided]

[26] The Court has to consider as a test for vagueness whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning. To put it at its simplest, a reader must be unable to distil from the statement a clear, single meaning.[15] Venter and Others NNO v Barrit; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd.

[27] The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.[16] [Emphasis provided] Standard Bank of South Africa v Hunkydory Investments

Cause of action:

[28] The term “cause of action” was defined in *McKenzie v Farmers’ Co-operative Meat Industries Ltd* [17] as “...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the 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.”

In *Evans v Shield Insurance Co Ltd* [18] it was said that “cause of action... is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff’s legal right of action.” [my emphasis]

[29] Rule 18(4) is interpreted and applied as requiring that a cause of action or defence must be contained in the pleading. The significance and requirements of Rule 18[4] were commented on in *Trope v South African Reserve Bank* [supra] at 210G – J:

[30] I am also attuned to the legal proposition that the enquiry into whether or not a pleading is vague and embarrassing, involves firstly the question whether the pleadings lack particularity to the extent that it is vague and secondly, whether or not the alleged vagueness causes embarrassment of such a nature that the excipient is being prejudiced.

[31] Pleadings must be lucid, logical and intelligible. A litigant must plead his cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he has to meet.

[32] This first requirement of necessity puts the pleader’s legal knowledge of what the necessary allegations or essential elements are to sustain a cause of action to the test. As Hiemstra J so aptly reminded all would-be pleaders:

*“The case will have to turn mainly on the pleadings, and it vividly illustrates the truth of what the late Prof. Wille used to say:*

‘Before you can draw a pleading you’ve got to know the law.’ ”

*Alphedie Investments [Pty] Ltd v Greentops [Pty] Ltd* 1975 [1] SA 161 T at 161H A “...clear and concise statement...” of “...sufficient particularity to enable the opposite party to reply thereto”

[33] The plaintiff is certainly not entitled to plead a jumble of facts and

force the defendant to sort them judiciously and fit them together in an attempt to determine the real basis of the claim.[19] *Roberts Construction Ltd v Dominion Earthworks Ltd*.

#### APPLICATION OF THE LEGAL PRINCIPLES TO THE FACTS

[34] I thus also propose to approach the matter on the foregoing basis.

[35] Armed with the above legal principles, I propose to approach the facts of this case and apply the foregoing principles to the above facts. I am further reminded, when reading on the basic principles governing an exception which were summarised by Makgoka J in *Living Hands (Pty) Ltd and Another v Ditz and Others*, that

*“(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.”*

- [36] I am of the view that in matters such as this, the court needs to cut to the chase and to approach same from a practical point of view, resolution of matters based merely on technicalities only serves to delay the resolution of disputes between the parties much to the unnecessary escalation of costs in the dispensing of justice.
- [37] With that in mind I propose to deal firstly with the complaints levelled against the Plaintiffs’ Summons.
- [38] In my view the Defendant passed the threshold to satisfy the first requirement regarding paragraphs 5 and 16, namely that the particulars of claim is vague and embarrassing on the grounds relied upon. Locus standi is fundamental to due process for without it, proceedings are invalidated.[20]

The plaintiffs are not a juristic person (Universitas). The trust had not authorised the Plaintiffs to institute proceedings on its behalf. Plaintiffs as beneficiaries of the trust, owes its existence to the trust and functions under the auspices of the trust. That being so, the plaintiffs had no locus standi to move for the relief set out in its amended pleadings.[21] Therefore Plaintiffs’ particulars of claim fail to sustain a complete cause of action.

- [39] Regarding the portions of paragraph 7 that relates to the exception taken in paragraph 5 and 16 above, the very same applies with regards to locus standi.
- [40] I turn to consider the complaints regarding paragraph 12. In my view, the defendant has satisfied the threshold requirement to establish that the particulars of claim is vague and embarrassing on the grounds relied upon by the defendant. There is an apparent inconsistency between misplaced and damaged.[22] Averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can only be left to assume as to the actual meaning (if any) conveyed by the pleading.
- [41] Rule 18(10) makes it clear that a plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof.

#### FINDING:

- [42] I accordingly find that the 2nd Defendant will be prejudiced should the exception be dismissed or the paragraphs it complains of not be expunged. I find that the Defendant cannot properly plead to the case as formulated.
- [43] I also find that the Plaintiffs’ case is pleaded in such a manner that the Defendant cannot reasonably ascertain what the Plaintiffs’ case is, and furthermore what it is in for. It appears to me that the particulars of claim as pleaded, does not meet the requisite prescripts.

**COSTS:**

- [44] Counsel for 2nd Defendant requested costs to be awarded on a punitive scale due to the fact that the Plaintiffs did not file answering papers.
- [45] Rule 23(4) states that wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.
- [46] I, in any event, can not find anything that warrants such a cost order. Accordingly, I am inclined to award costs on a party- and- party scale.

**CONCLUSION:**

- [47] I am persuaded that the grounds of exception were such that the defendant would be seriously prejudiced if the offending pleading were to be allowed to stand as is.

**ORDER:**

- [48] For all of the above reasons, I come to the following conclusion:

1. The exception is upheld; with costs
2. The Plaintiffs are given leave to amend the particulars of claim by way of notice of amendment within 15 days of the date of this order;
3. If the amendment is not effected, leave is granted to the Defendant to approach this court on the same papers, duly amplified, for an order dismissing the claim.
4. The Plaintiffs are ordered to pay the costs on a party- and -party scale.

AS BOONZAAIER AJ

On behalf of Plaintiffs : Mr MJ Ponoane

Instructed by

: Ponoane Attorneys

Bloemfontein

On behalf of 2nd Defendant : Adv CJ Hendricks

Instructed by

: Peyper Attorneys

1Rule 23 reads in the material part: “(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 set it down for hearing in terms of paragraph (f) of sub rule (5) of rule (6).

[2]Rule 18[4] requires that each pleading in an action “...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.”

[3]Case No: 2014/37464.

[4] 1960 (4) SA 383 (D) at 393 E-H.

[5] Makgae v Sentraboer Koöperatief Bpk 1981

[4] SA 239 T at 244 C-H.

[6] 1954(1) SA 133 K at 138-139

[7] Marney v Watson 1978

(4) SA 140 (C) at 144 F-J (Coram Friendman J).

[8] Voget v Kleynhans 2003

(2) SA 148 (C) at 151 G-H (Coram Van Reenen J).

[9] 1993

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

[10] 1949

(3) SA 1081 (SR) at 1082.

[11]2013

(5) SA 496 (SCA) at 506E - I (Ponnan JA).

[12] 2003

(4) SA 142 at 149F – H (per Basson J).

[13] 2014

(2) SA 157 (GNP) at 166G-H.

[14] 1904 TS 101 at 103.

[15] 2008

(4) SA 639 (C) at 644B (per Potgieter AJ).

[16] 194 (Pty) Ltd and Another (No 1) 2010

(1) SA 627 (C) at 630B (per Steyn AJ).

[17] 1922 AD 16 at 23.

[18] 1980

- [2] SA 814 A at 825G.
- [19] 1968 (3) 255 at 263.
- [20] Tulip Diamonds FZE v Minister of Justice and others 2015 (2) SACR 443 (CC) at para 45.
- [21] Bunton & Another v Coetzee & Another (A4230 2012) [2014] ZAGPPHC 553 11 AUG 2014 at para 16.
- [22] See Parow Lands (Pty) Ltd v Schneider 1952 (1) SA 150 (SWA) at 152F-G.
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