

SOUTH AFRICA / JUDGMENT

Opti Feeds (Pty) Ltd v Raymond Glynn Keeny t/a Raynel Ranches (1255/01) [2016] ZANWHC 10 (17 March 2016) [2016] ZANWHC 10

COURT

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

1255/01

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

WEST DIVISION, MAHIKENG)

CASE

NO.: 1255/01

DATE:

17 MARCH 2016

In

the matter between:

OPTI

FEEDS (PTY)

LTD.....PLAINTIFF

And

RAYMOND

GLYNN KEENY t/a RAYNEL

RANCHES.....DEFENDANT

JUDGMENT

Landman J:

Introduction

- [1] Opti Feeds (Pty) Ltd, the plaintiff in the main action, (the Plaintiff) takes exception to the plea and counterclaim delivered by Raymond Glynn Keeny trading as Raynel Ranches (the defendant). The plaintiff also opposes an application by the defendant to amend his plea.
- [2] The plaintiff's case is essentially that, the defendant applied (before the plaintiff's name was changed and before the Consumer Protection Act 68 of 2008 (the CPA) came into operation) for a credit facility and thereby consented to its written general terms and conditions of sale as stipulated on "NW1". Subsequently the plaintiff sold and delivered chicken feed to the defendant subject to the general terms and conditions. Copies of the invoices are attached to plaintiff's amended particulars of claim. But the defendant has failed to pay R1 338 087.91 that he owes.
- [3] The defendant delivered a plea and a counterclaim. The plaintiff gave notice that these pleading were in certain respects vague and embarrassing and did not disclose a defence. The defendant wished to amend its plea but the plaintiff objected to it. This application serves before me. The plaintiff has also taken several exceptions on the basis that the first counterclaim is vague and embarrassing and does not disclose a cause of action.

The law

- [4] *Inzinger v Hofmeyr and Others* (7575/2010) [2010] ZAGPJHC 104 (4 November 2010) at paras 4 and 5 it was said:

'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 836 W at 905E-H:

"I must first ask 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. Vagueness amounting to embarrassment and embarrassment in turn resulting in prejudice must be shown. Vagueness would invariably be caused by a defect or 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 to pleading against which the objection lies.'

- [5] In *Jowell v Bramwell Jones Heher J* went on to say:

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

- (a) minor blemishes are irrelevant;

- (b) pleadings must be read as a whole; no paragraph can be read in isolation;
 - (c) 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 for evidence;
 - (d) only facts need be pleaded; conclusions of law need not be pleaded;
 - (e) bound up with the last-mentioned 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...'
- [6] In the end, the approach adopted in *Lockhat and Others v Minister of Interior* 1960 (3) SA 765 (N) at page 777 must be followed. The court observed that:

'As long as the declaration reasonably states the nature, extent, and grounds of the cause of action, the court will not as a rule, strike out paragraphs as vague and embarrassing.'

- [7] As regards an exception that a plea does not disclose a defence or a claim an action Van Heerden JA said in *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 at 553G-I:

'It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial: *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706. Save for exceptional cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him (cf *Welgemoed en Andere v Sauer* 1974 (4) SA 1 (A)), an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of "unnecessary" evidence.'

The plea

- [8] Before dealing with each complaint it is useful to determine, if I can, what the defence is that is raised by the plea. If the plea discloses a defence I must then examine each complaint to determine whether it disturbs my *prima facie* view. In outline the defendant's defence is the following:
- (a) The defendant denies that the plaintiff changed its name. But now admits it.
 - (b) The defendant denies that he concluded the written application for credit upon which the plaintiff relies and that these terms and conditions apply to their relationship.
 - (c) But if the credit application is found to have been concluded the defendant says that it (including the non-variation clause) was amended orally.

- (d) If the terms and conditions were not validly amended the plaintiff is estopped from relying on the invalidity;
 - (e) If the oral variation is ineffective the prohibition on oral variation is contrary to public policy.
 - (f) Separate oral agreements were concluded on the dates that the defendant ordered feed and the CPA applies to them.
 - (g) Some unspecified “boilerplate clauses” of the credit application are alleged to be in contravention of the CPA or is manifestly unfair, unreasonable and unjust.
 - (h) A dispute about the any statement or invoice could be raised at any stage.
 - (i) The plaintiff has failed to provide the defendant with each and every invoice and statement. And therefore certain amounts are in fact not due but cannot be established without a rendering and debatement of account.
 - (j) The defendant has to an extent overpaid what is due in the period 2009-2013.
 - (k) The plaintiff delivered defective chicken feed and products to the defendant and it was agreed that the defendant would be credited with certain amounts.
 - (l) The plaintiff is indebted to the defendant in an amount of R1 921 172.24 for maize sold and delivered to the plaintiff and has failed to set off this amount as agreed.
 - (m) The defendant prays that the issue of its indebtedness, if any, be stayed pending the outcome of his claim for statement and debatement.
- [9] The plaintiff has listed 11 complaints (but does not persist with the first complaint) as to the plea and claims that certain paragraphs are vague and embarrassing. I understand why the plaintiff has complained. This is because the defendant has not in, some instances pleaded in accordance with rule 18(4), (5) and (6).
- [10] The second complaint is that the plaintiff is unable to reply to paragraph 6.8 because the defendant has not identified the offending so-called boiler plate clauses. There is merit in this complaint. It is no defence to say that the lack of particularity will be cured by requesting further particulars for purposes of trial. The plaintiff will be prejudiced if it is unable to deliver a reply. The same considerations apply to the third, fourth, fifth, seventh, eighth, ninth, and tenth complaints.
- [11] A defendant is obliged to admit or deny or confess and avoid the averments made by the plaintiff in its particulars of claim. The defendant has attempted to do so in paragraph 34.1 and 34.2 but it is unclear what is admitted and what is denied. The defendant has supplied insufficient particulars so that paragraphs 34.1 and 34.2 are vague and embarrassing and prejudice the plaintiff in so far as it will be unable to reply to the plea. The sixth complaint is upheld.

- [12] The eleventh complaint is addressed in the tenth complaint. The paragraph is unobjectionable. The alleged clash between the plaintiff's certificate of indebtedness and the defendant's averment can only be resolved when evidence is led.
- [13] The twelfth complaint rests on the exception taken to the counterclaim and need not be addressed here.
- [14] The plaintiff has taken 8 exceptions that the plea lacks averments to sustain a defence. All these exceptions require that I must accept the basis of the plaintiff's case in order to evaluate the plea. But this requires, in effect, that I judge the defendant's plea against the plaintiff's case. I may not do so. The defendant is entitled to plead and challenge the plaintiff's case as it believes fit. Unless I am satisfied that the plea cannot be read in any way that does not disclose a defence, I must dismiss the exceptions.
- [15] The thirteenth, fourteenth and fifteenth complaints requires me to decide on paper whether the non-variation clause could not itself be varied or that the plaintiff is not estopped from relying upon it or that it is contrary to public policy. These are proper subjects for the trial court.
- [16] The sixteenth, seventeenth, nineteenth and twenty-first complaints. These complaints are valid only if the plaintiff's particulars of claim are decisive. However, the plea is that the chicken feed was purchased in terms of various part oral and part written agreements that were concluded after the CPA came into operation. This being the case when the terms of the agreements upon which the defendant relies are established, the CPA may be applicable.
- [17] The eighteenth complaint is met by the proposed amendment and therefore falls away.
- [18] The twentieth complaint rests on an assumption that the particulars of claim have been proven. This is of course not the case as the validity or applicability of clause 10.3 of "NW1" is in issue.

Amendment of the plea

- [19] The defendant wishes to amend its plea by admitting the identity of the plaintiff and by alleging that the credit application "NW1" does not correctly record the original agreement. The defendant sets out in what respects the recordal is alleged to be incorrect and claims rectification. The defendant also alleges that the contractual terms of the agreements were partly in writing and partly oral (paragraph 4.2).
- [20] There can be no objection to the admission of an averment made by the plaintiff as regards its identity.

- [21] The plaintiff raises two objections to the proposed amendments. The first objection is that as the defendant admits signing “NW1” the parties had reached consensus as to its terms and conditions. The trial court may find this to be the case. But the plea can be read that, in spite of signing “NW1”, the document does not record the consensus.
- [22] The proposed new paragraph (4.2.) is not inconsistent with a claim for rectification of the written part of the agreement save, if one accepts the plaintiff’s case, which is not permissible at this stage.
- [23] The second objection is that if the amendment proposed in paragraph 2 is permitted and the terms are rectified with effect from 2004 (the outset), the allegations in paragraphs 6.2, 6.3, 10.2, 10.3, 11.2, 12.2, 14.3, 17.3, 29.3 and 30.4 of the agreement were amended after 2004, are in conflict and therefore the proposed amendment would make the plea vague and embarrassing in this respect. I agree. The application to amend this part of the plea is refused. Of course the defendant is entitled to propose a fresh amendment.

The counterclaim

- [24] The first counterclaim alleges the following:
- (a) Various oral agreements were concluded in terms of which the plaintiff sold and delivered chicken feed to the defendant.
 - (b) The agreements were concluded between 2009 and 2013.
 - (c) The defendant sets out the terms, on which he avers, the parties agreed and, in the alternative, the terms contained in the credit application “NW1” as orally amended and in the further alternative certain other terms.
 - (d) The plaintiff failed to apply the terms of the agreement in several respects.
 - (e) The plaintiff initially refused to account to the defendant but has done so and the parties have debated the account but have not resolved the dispute.
 - (f) The defendant prays for an order:
 - (i) that the terms of the agreement between the parties be determined and/or defined by the court;
 - (ii) debatement of the plaintiff’s account;
 - (iii) payment to the plaintiff of what is due;
 - (iv) costs.

- [25] The plaintiff has listed 6 complaints that certain paragraphs are vague and embarrassing. The first counterclaim must be examined on its own merits. For this reason the first complaint cannot be upheld. The second, third, fourth, fifth and sixth complaints (as regards Paragraphs 10.3 and 10.4) is that the allegations lack the detail required so that, a plaintiff is unable to properly respond to the plea. Particulars may be sought for purposes of trial. The plaintiff is able to plead to the first counterclaim.
- [26] The plaintiff has taken 2 exceptions (seventh and eighth exceptions) that the plea lacks averments to sustain a claim. The seventh complaint may well be decisive at the trial but not at the exception stage. The eighth complaint is a valid one. The prayer for this court to establish the terms of the alleged agreements is not a competent prayer because courts do not determine the terms of the contract but will resolve a dispute concerning the disputed terms or conflicting averments as to the agreed terms of an agreement. There must be a prayer for the rendering of an account.
- [27] The second counterclaim is a conditional counterclaim as regards the maize sold and delivered and falls away if the plaintiff admits the claim. The defendant claims payment of R1 921 172.24. No exception is taken as regards this claim.

Summary

[28] To sum up:

- (a) I am satisfied that the plea is vague and embarrassing and that the second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth exceptions that the plea is vague and embarrassing should be upheld and the plea struck out. The remainder of the exceptions taken fall to be dismissed. The defendant should be granted an opportunity to amend its plea in order to deal with the cause of the complaints. The defendant is liable for the costs of the successful exceptions.
- (b) The application to amend the plea as proposed in paragraphs 1, 3 and 4 of the notice to amend should be allowed. The remainder of the application to amend the plea should be refused. The costs should be costs in the cause as both parties have had some success.
- (c) I am not satisfied that the first counterclaim is vague and embarrassing and the exceptions fall to be dismissed. However, the

eighth exception that the first counterclaim does not disclose a cause of action is valid. The seventh exception is dismissed. The defendant should be granted an opportunity to amend its first counterclaim in order to deal with the cause of the complaints. The costs should in fairness be costs in the cause as the both parties have had some measure of success.

Order

[29] In the result I make the following order:

1(a) The second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth exceptions that the plea is vague and embarrassing are upheld and the paragraphs to which they relate are struck out.

(b) The remainder of the exceptions taken fall to be dismissed.

(c) The defendant may within 21 court days from the date of this order amend its plea in order to deal with the cause of the complaints.

(d) The defendant is to pay the costs of the successful exceptions.

2(a) The application to amend the plea as proposed in paragraphs 1, 3 and 4 of the notice to amend is granted.

(b) The remainder of the application to amend the plea is refused.

(c) The costs of opposition to the amendment are to be costs in the cause.

3(a) The eighth exception that the first counterclaim does not disclose a cause of action is upheld and the first and second prayers are struck out.

(b) The remaining exceptions are dismissed.

(c) The defendant may within 21 court days from the date of this order amend its first counterclaim in order to deal with the cause of the complaint.

(d) The costs are to be costs in the cause.

A A Landman

Judge of the High Court

Appearances

Date of hearing: 3 March 2016

Date of Judgment: 17 March 2016

For the Plaintiff: Adv Pretorius

Instructed by Nienaber & Wissing Attorneys

For the Defendant: Adv Aucamp

Instructed by Minchin & Kelly Attorneys Inc

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