

SOUTH AFRICA / JUDGMENT

## Von Botticher v Audatex (Pty) Ltd (11904/2015) [2016] ZAGPJHC 348 (22 April 2016) [2016] ZAGPJHC 348

COURT

South Gauteng High Court, Johannesburg

BEFORE

M B Mahalelo

CASE / FILE NUMBER

11904/2015

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 11904/2015

DATE: 22/4/2016

In the matter between:

INGO VON BOTTICHER

Plaintiff

and

AUDATEX (PTY) LTD

Defendant

### J U D G M E N T

MAHALELO, AJ:

- [1] This is an exception against the plaintiff's particulars of claim in that same lacks the necessary averments to sustain a cause of action, alternatively is vague and embarrassing. The plaintiff's claim is dependent upon a written agreement which was subject to a suspensive condition. The attack against the cause of action pleaded was directed at the validity of that agreement.

## FACTS

- [2] On 11 December 2013 the plaintiff and the defendant entered into a written Settlement Agreement the terms of which were inter alia, that the plaintiff's employment with the defendant shall terminate by mutual agreement with effect from 10 December 2013 and 2437 Restricted Stock Units held by Solera Holdings Incorporated to vest in the plaintiff on the same date. Clause 11 of the Settlement Agreement contained a suspensive condition the terms of which were that:
- 2.1.1 the plaintiff procures the amicable termination of the agreement entered into between the defendant and E-Parts (Pty) Ltd (E-Parts) dated 5 January 2009 by no later than 31 March 2014;
- 2.1.2 the plaintiff procures that E-Parts furnishes the defendant with an Intellectual Property Release ("IRP") at no cost to the defendant by no later than 31 March 2014 in terms of which the defendant will formally receive assignment from E-Parts all Intellectual Property (IP).
- [3] During December 2013 the defendant entered into negotiations with E-Parts with regard to the formal assignment from E-Parts, of all IP owned by E-Parts to the defendant and on 18 June 2014 entered into a written agreement in terms of which E-Parts formally assigned the E-Parts IP to the defendant, who, in turn accepted assignment thereof with effect from 11 March 2014.
- [4] On 27 March 2015 the plaintiff issued summons against the defendant for an order vesting in the plaintiff 2 437 Restricted Stock Units ("RSUs") held in the defendant by Solera Holdings Incorporated ("Solero") alternatively payment of US \$151 069.63 with interest
- [5] The plaintiff averred that the conduct of the defendant set out in paragraph 3 above constituted a waiver of the suspensive conditions of the Settlement Agreement, thereby relieving him from any obligation to fulfil the suspensive condition. It is further averred by the plaintiff that, the defendant, pursuant to its waiver of the suspensive condition, became obliged to do all such things, to perform all such steps and to procure the vesting of the RSUs in the plaintiff with effect from 10 December 2013.
- [6] The plaintiff asserts that it has called upon the defendant in writing to, inter alia, procure the vesting of the RSUs in it, the defendant has failed and/or refused to comply thereby breaching the terms of the Settlement Agreement.
- [7] In its notice of exception, the defendant contended that:
- (a) the Settlement Agreement was subject to a suspensive condition which was to be fulfilled or waived by no later than 31 March 2014,
- (b) the agreement concluded between it and the plaintiff had lapsed due to failure by the plaintiff to fulfil or waive the suspensive condition and is of no force or effect,

- (c) the plaintiff cannot rely on the agreement entered into between the defendant and E-Parts dated 18 June 2014 to contend that the defendant waived the suspensive condition as that agreement was concluded after 31 March 2014

,(d) as a consequence, the particulars of claim do not disclose a legally permissible cause of action or does not provide sufficient particularity to indicate on what legal basis the plaintiff is entitled to rely.

#### THE RELEVANT LEGAL PRINCIPLES

- [8] It is trite that there is often a overlap between exceptions based on a vague and embarrassing complaint, and those relating to lack of particularity required by rule 18(4). Where a plaintiff's pleadings do not comply with the requirement of rule 18 in that for an example, the specific particulars are not set out therein, and are also vague and embarrassing the defendant has a choice whether to proceed in terms of rule 18 or rule 23 procedure. A defendant is entitled to bring both procedures in the alternative.
- [9] It is a basic principle that particulars of claim should be so phrased that the defendant may reasonably and fairly be required to plead thereto. It is also trite that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form, and the cause of action must appear clearly from the factual allegations made. In order to ensure that a summons is not excipiable on the ground that it does not disclose a cause of action, the plaintiff must allege the *facta probanda* (the facts which must be proved in order to disclose the cause of action) and not the *facta probantia*, (the facts or evidence which proves the *facta probanda*).
- [10] In *McKenzie v Farmer's Cooperative Meat Industries Ltd* 1922 AD 16 at 23 the following definition of "cause of action" was accepted by the Appellate Division:
- "... every 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 every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*
- [11] In *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) Marais JA stated the following at 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 be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law."*
- [12] Where an exception to a pleading is based on the ground that it is vague and embarrassing, the court has to consider whether the pleading lacks particularity to the extent that it is vague and whether the vagueness causes embarrassment of such a nature that one is prejudiced. This prejudice lies in the excipient's inability properly to prepare to meet the opponent's case. Where a court upholds an exception on the ground that it is vague and

embarrassing, leave to amend is generally granted to the party who produced the excipiable pleading.

- [13] The approach to be adopted where a matter involves a complaint that a pleading is vague and embarrassing therefore excipiable was identified in *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 905H-I as follows:

*“12.1 The question must first be asked whether the exception goes to the heart of the claim; and*

*12.2 If so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet; and*

*12.3 Should he find that an exception on any ground fails, to then ascertain in the second place whether the particulars identified by the defendant are strictly necessary in order to plead and, if so, whether the material facts are unequivocally set out.”*

- [14] In *Frank v Premier Hangers CC* 2008 (3) SA 594 (C) Griesel J stated as follows at paragraph [11] page 600:

*“[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 this, the exception ought not to be upheld.”*

## THE EXCEPTION

- [15] It is trite that from the nature of exception proceedings, the court must assume that the facts alleged in the relevant pleadings are correct. The excipient should therefore satisfy the court that even with such an assumption, the pleading does not disclose a cause of action. One will therefore have to accept as pleaded in the particulars of claim that:

15.1 The plaintiff and defendant concluded a written Settlement Agreement which was subject to a suspensive condition.

15.2 The suspensive condition was to be fulfilled or waived by no later than 31 March 2014.

15.3 The suspensive condition was for the sole benefit of the defendant which the defendant was accordingly entitled to waive.

5.4 During December 2013 the defendant entered into negotiations with E-Parts, the subject matter of which was the formal assignment from E-Parts of all intellectual Property owned by E-Parts to the defendant.

15.5 On 18 June 2014 the defendant and E-Parts concluded a written agreement (the IP Assignment Agreement) in terms of which E-Parts formally assigned the E-Parts IP to the defendant.

15.6 The IP Assignment Agreement has its effective date as 1 March 2014.

- [16] The plaintiff contended that, the conduct of the defendant mentioned in sub paragraphs 15.4, 15.5 and 15.6 above constituted a waiver of the suspensive condition, the plaintiff was relieved from any obligation to fulfil the suspensive condition, accordingly the defendant became obliged to procure the vesting of the RSUs in the plaintiff with effect from 10 December 2013. It will be for the defendant to disprove such allegations by way of acceptable evidence. No evidence is presented in exception proceedings.
- [17] In my view the plaintiffs has pleaded the facta probanda to sustain a claim under the Settlement Agreement. I also find that the exception raised in this regard does not meet the requirement that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. It is incumbent on a plaintiff to plead only a complete cause of action that identifies the issues on which the plaintiff seeks to rely, and on which evidence will be led, and which allows the defendant to plead to it.
- [18] An attack mounted by a defendant that particulars of claim are vague and embarrassing cannot be found on the mere averment that they are lacking in particularity and where the complaint is one of lack of particularity, the remedy is to request discovery or particulars for trial. See *Nel and Others NNO v McArthur and Others* 2003 (4) SA 142 (T) at 147.
- [19] Whether the suspensive condition has been fulfilled or waived, and whether the plaintiff can rely on the 18 June 2014 agreement in my view, is a matter to be decided at trial.
- [20] The exceptions must therefore fail.
- [21] In the result the following order is made:
- 21.1 The exception is dismissed with costs.

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M B MAHALELO

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Counsel for the Plaintiff: Adv HP West

Instructed by: Dr Wooley Attorneys

Counsel for the Defendant: Adv E Rudolph

Instructed by: Werksmans attorneys

Date of Hearing: 2 February 2016

Date of Judgment: 22 April 2016

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