

SOUTH AFRICA / JUDGMENT

Zoetendal Vineyards (Pty) Ltd v Aquest Colsen (Pty) Ltd (708/2024) [2024] ZAECQBHC 55 (1 October 2024) [2024] ZAECQBHC 55

COURT

Eastern Cape High Court, Gqeberha

BEFORE

NJ Mullins

CASE / FILE NUMBER

708/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GQEBERHA)

Case

No: 708/2024

Date

Heard: 12 September 2024

Date

Delivered: 1 October 2024

In

the matter between:

ZOETENDAL
VINEYARDS (PTY) LTD
RESPONDENT / PLAINTIFF
and
AQUEST
COLSEN (PTY) LTD
APPLICANT / DEFENDANT

JUDGMENT

MULLINS AJ:

- [1] This is an application brought by the Defendant[1] to declare certain allegations in the Plaintiff's particulars of claim excipiable on the basis that they are vague and embarrassing, alternatively that the particulars of claim lack the necessary averments to sustain the cause of action.
- [2] During argument the Defendant's counsel, Ms Morris, quite correctly did not pursue the alternative relief. It remains to determine whether the allegations objected to are vague and embarrassing as envisaged by rule 23(1) of the Uniform Rules of Court.
- [3] The matter involves a dispute over the terms of a contract concluded between the parties in terms of which the Plaintiff claims payment of the balance of the contract paid.
- [4] The averments in the particulars of claim to which the Defendant objects read as follows:
- (a) "4. During or about June 2021 and at Cape Town, the parties entered into a partly written and partly oral contract, the terms of which were as follows:
- ...
- 4.3. It was further agreed that payment of the purchase price would be made as and when certain milestones of the manufacture, assembly, delivery and commissioning and handover of the Water Plant had been met.
- ..."
- (b) "5. The Plaintiff made payment as and when the milestones had been met to the Defendant, the total amount having been paid by the Plaintiff being R2,695,000.00 (Two Million Six Hundred and Ninety-Five Thousand Rand), and with an amount of R805,000.00 (Eight Hundred and Five Thousand Rand) becoming due only after delivery, commissioning, and handover by the Defendant."
- (c) "7. During or about September 2022, and prior to delivery, commissioning and handover of the Water Plant, the parties agreed on a conditional addendum to the agreement, in terms of which the parties agreed as follows:
- ..." . (Underlined for emphasis).
- [5] With regard to the introductory portion of paragraph 4 of the particulars of claim the Defendant's objection is that it does not comply with rule 18(6), in that the written portion of the contract is not attached.

- [6] With regard to paragraph 5, read with sub-paragraph 4.3, of the particulars of claim the complaint is that without knowing the exact terms of the milestones the Defendant is unable to plead thereto.
- [7] With regard to paragraph 7 of the particulars of claim the Defendant relies again on rule 18(6), in that it is not pleaded whether the conditional addendum is oral or in writing and, if in writing, a copy thereof is not attached. In addition, the place where the conditional addendum was concluded and the identity of the persons who represented the parties is not pleaded.
- [8] The Plaintiff, who was represented by Mr Moela, argued that one should not look at pleadings through a magnifying glass and that, while the particulars of claim may not be perfect, the Defendant was able to plead thereto and if necessary in due course request particulars for trial and/or rely on discovery. It was further argued that there was no prejudice to the Defendant.
- [9] Mr Moela had another string to his bow. He argued that the Defendant had adopted the incorrect procedure. It should have proceeded by way of rule 30.
- [10] I pause to mention that rule 30 was raised for the first time in argument before me. When I pointed this out Mr Moela (who was not responsible for the heads of argument) he submitted that as it was a legal point it was permissible to raise it at any stage. In the circumstances he was entitled to argue the point, which was responded to by counsel for the Defendant.
- [11] It should also be pointed out that in the present context the reference to rule 30 should in fact be to rule 30 read with rule 30A (which replaced sub-rule 30(5)), but nothing turns on this as the argument, and the opposition thereto, was clearly premised on the provisions rule 30A, which provides as follows:

“30A Non-compliance with Rules and Court Orders

- (1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order –
- (a) that such rule, notice, request, order or direction be complied with; or
- (b) that the claim or defence be struck out.”
- [12] Before dealing with the three grounds of exception it would be apposite to summarize the principles applicable to an exception which is taken on the basis that a pleading is vague and embarrassing. I can do no better than to quote McCreath J in *Trope v South African Reserve Bank and Another* (at 211B – C):[2]

“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 (Quinlan v MacGregor 1960 (4) SA 383 (D) at 393E-H). As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test – see the remarks of Conradie J in Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other’s case and not be taken by surprise may well be defeated.”

- [13] In Quinlan v MacGregor (quoted in the above passage in Trope) the following was stated (at 393G – H):

“It seems to me that in each case the Court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. If there is vagueness in this sense the Court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him, in his efforts to plead to the offending paragraph, by the vagueness complained of. In each case the Court must, in my judgment, make an ad hoc ruling as to whether the embarrassment is, or is not, so serious as to cause prejudice to the excipient if he is compelled to plead to the paragraph in the form to which he objects. It seems to me that the eventual test as to whether the exception should be upheld or not is whether the excipient is prejudiced. Furthermore, it seems to me that the onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. Unless he can do this, the exception, in my judgment, must be dismissed.”

- [14] It has also been held that an over-technical approach should not be adopted,[3] that the court looks benevolently rather than over-critically at pleadings,[4] that an excipient must satisfy the court that it will be seriously prejudiced if the offending pleading were allowed to stand and that a very clear and strong case must be made out before an exception can succeed.[5]

- [15] In other words, the bar is set very high. In Van Zyl NO and Another v Smit[6] the following was stated:

“[18] An exception that a pleading is vague or embarrassing will not be upheld unless the excipient will be seriously prejudiced. The excipient has a duty to persuade the court that the pleading is excipiable on any interpretation that can be attached to it. An exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action: it goes to the whole cause of action, which must be demonstrated to be vague and embarrassing. Such an exception strikes at the formulation of the cause of action and not its legal validity. 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. 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. The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.” (Underlined for emphasis).

- [16] I will deal with grounds 1 and 3 together. Rule 18(6) of the Rules provides as follows:

“18(6). A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.” (Underlined for emphasis).

- [17] There can be no doubt that rule 18(6) has not been complied with and that paragraphs 4 and 7 of the particulars of claim do not pass muster. However, bearing in mind the abovementioned principles, does this necessarily mean that the offending paragraphs are excipiable on the basis that they are vague and embarrassing? In answering that question I am very much alive to the fact that individual paragraphs must not be looked at in isolation, but that the pleading in question, in this case a particulars of claim, must be considered in its entirety. And serious prejudice to the excipient is a necessary requirement.
- [18] The Plaintiff relies on a contract, which was amended by a conditional addendum. The paragraphs objected to must be looked at in this light. It is thus essential, in my view, that the contract be pleaded with sufficient clarity so as to afford the Defendant an opportunity to know what case it has to meet.
- [19] Which brings me to Mr Moela’s argument that the Defendant should have relied upon rule 30 rather than taking an exception. In support of his argument he relied heavily on Moosa and Others NNO v Hassam and Others NNO.[7] In that matter the plaintiffs relied on a written contract but failed to annex it because they were not in possession of a copy thereof, and pleaded as much. The defendants relied on rule 18(6) read with rule 30. On the facts the court found that the failure to attach the written contract was indeed an irregular step as provided for in rule 30.
- [20] Moosa did not deal with the question of which procedure (rule 30 versus rule 23) was the appropriate one in the circumstances. However this issue was considered by Heher J in Jowell v Bramwell-Jones and Others[8] (at pp. 902B – 903B):

“When the lack of particularity relates to mere detail, the remedy of the defendant is to plead to the averment made and to obtain the particularity he requires:

- (i) either by means of the discovery/inspection of document procedure in terms of the Rules; or
- (ii) by means of a request for particulars for trial of those particulars

which are strictly necessary to enable the defendant to prepare for trial.

The framers of the Rules have provided different remedies in Rules 18 and 23. The presumption is that they are not co-extensive, but designed to deal with different situations. Rule 18 is restrictive and sets out the bare minimum required of a factual averment, while Rule 23 goes to a vagueness and embarrassment which strikes at the whole of the cause of action pleaded. As Cloete J said in Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen 1992

- (4) SA 466 (W) at 469J--470, ` . . . if a pleading both fails to comply with Rule 18 and is vague and embarrassing, the defendant has a choice of remedies' (i.e. to

proceed by way of Rule 23 or Rule 30). I agree with counsel that the crucial distinction between Rules 23 and 30 may be summarised as follows:

- (a) an exception that the pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded; whereas
- (b) Rule 30 may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity; it

is not necessary that the failure to plead material facts goes to the root of the cause of action.

It is therefore incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it. The attacks mounted by the defendants that their particulars of claim are vague and embarrassing cannot found on the mere averment that they are lacking in particularity. This might, depending on the circumstances, allow an application in terms of Rule 30. An allegation that a pleading is vague and embarrassing is a far more serious one than a complaint about particulars.

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;" (Underlined

for emphasis).

[21] The Plaintiff's cause of action relies on a contract, which the Plaintiff has pleaded, albeit imperfectly. That goes to the particularity, not the root cause of the action. In the circumstances, while the paragraph objected to is irregular, it is not vague and embarrassing.

[22] Paragraph 7 is on a similar footing, although the terms of the conditional addendum are pleaded at length in nine sub-paragraphs. It is so that the place where the conditional addendum was concluded, who represented the parties and whether it was in writing or oral have not been pleaded, but the Defendant knows precisely what the Plaintiff's case is in this regard. In addition, quite apart from pleading the terms of the conditional addendum in detail, reference is made in the particulars of claim to an exchange of correspondence

between the parties' attorneys, which exchange is attached thereto, in which, inter alia, the Plaintiff's case with regard to the conditional addendum (and other issues) is exhaustively set out.

- [23] As pleadings must be examined holistically and be given their most benevolent interpretation I find that paragraph 7 is also not vague and embarrassing. The fact that the paragraph does not comply in all respects with rule 18(6) is another matter. The Defendant did not rely on a rule 30 and in this regard I must agree with Mr Moela. Most important, the Defendant is not seriously prejudiced by the manner in which the conditional addendum has been pleaded.
- [24] I turn now to paragraph 5, read with paragraph 4.3, of the particulars of claim. The debate over which procedure (rule 30 versus rule 23) is not of relevance to this complaint. What the "milestones" were is not pleaded, nor can they be gleaned from the particulars of claim as a whole. In my view, having pleaded that payment was to be made on the achievement of certain milestones it was incumbent upon the Plaintiff to have specified them. This goes beyond a mere failure to comply with rule 18. As the claim is for the payment of monies outstanding, which payment depended on the achievement of the milestones, the failure to detail those milestones goes beyond mere particularity and is patently prejudicial to the Defendant and in this regard I find that the particulars of claim are vague and embarrassing.
- [25] Insofar as costs are concerned, as both parties have been partially successful, I intend to make no order as to costs.
- [26] In the circumstances I make the following order:
1. Paragraph 5, read with sub-paragraph 4.3, of the particulars of claim is declared to be vague and embarrassing in that it fails to plead the details of the "milestones" upon which payment of the contract price was dependent.
 2. The Plaintiff is afforded 15 days from the date of this order in which to amend the particulars of claim, failing which the Defendant shall be entitled to approach the court on the same papers, duly amplified if necessary, for the dismissal of the Plaintiff's claim.
 3. There will be no order as to costs.

NJ MULLINS

(ACTING JUDGE OF THE HIGH COURT)

REPRESENTATION: Obo the Defendant/Excipient: Adv. K MORRIS Instructed by: BDL
ATTORNEYS INC. 60 Second Avenue Newton Park GQEBERHA Obo the Plaintiff/Respondent: Adv.
L MOELA Instructed by: FERREIRA ATTORNEYS 15 Club Street Linksfield JOHANNESBURG c/o
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GQEBERHA

- [1] The parties will be referred to as they are cited in the main action.

- [2] 1992 (3) SA 208 (TPD)
- [3] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 465H.
- [4] First National Bank of SA Ltd v Perry NO 2001 (3) SA 960 (SCA) at 972I.
- [5] Francis v Sharp 2004
- (3) SA 230 (C) at 240 E – F and 237 D – I.
- [6]
- [2021] ZAGPPHC 499 (5 August 2021) at para [18]
- [7] 2010 (2) SA 410 (KZN)
- [8] 1998 (1) SA 836 (WLD)
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