

REPUBLIC OF SOUTH AFRICA



GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NO. 2012/27752

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

DATE

SIGNATURE

In the matter between:

FIRST RAND BANK LIMITED

Applicant

And

LUKE JOOSTE

Defendant

JUDGMENT

REDMAN AJ:

[1] The plaintiff claims payment of an amount of R6 935 408 arising out of the defendant's alleged breach of a contract of employment concluded with the plaintiff on 28 June 2001.

[2] On 13 September 2013 the defendant delivered an exception to the particulars of claim. In the exception, the defendant raised a number of complaints and concluded that the particulars of claim do not disclose a cause of action; the particulars of claim do not comply with rule 18(6) of the Uniform Rules of Court; and the particulars of claim are vague and

embarrassing. In the exception the defendant did not identify which specific ground of complaint was relied upon for each of the conclusions drawn.

[3] At the hearing of the exception, Mr Christophorou, on behalf of the defendant indicated that the defendant did not persist with the complaints raised in paragraphs 1.1 and 1.3 of the exception. Each of the conclusions drawn by the defendant (which appear to constitute the grounds for exception) are dealt with below.

NO CAUSE OF ACTION

[4] In none of the complaints raised by the defendant nor during the course of argument did the defendant identify the basis for its conclusion that the particulars of claim did not disclose a cause of action. The primary thrust of the defendant's argument was directed at the contention that the particulars of claim were vague and embarrassing and that the averments contained in the particulars of claim did not correspond with the terms contained in the written documentation attached thereto.

[5] Having abandoned the ground for complaint set out in paragraph 1.3 of the particulars of claim, there is no basis upon which I can find that the particulars of claim does not disclose a cause of action. The allegations contained in particulars of claim, if proved, are sufficient to sustain an action for damages against the defendant.

COMPLIANCE WITH UNIFORM RULE 18(6)

[6] At paragraph 3 of the plaintiff's particulars of claim it pleads as follows:

"3. On or about 26 June 2001 and at Johannesburg, the plaintiff and defendant entered into a written contract of employment ("the employment agreement"). A copy of the employment agreement (without annexures) is attached marked "FNB1". FNB1 comprises -

3.1. The defendant's employment contract with the plaintiff dated 28 June 2001;

- 3.2 Articles of agreement dated 28 June 2001;
- 3.3 Staff defalcation letter;
- 3.4 Confirmation of receipt of Code of Ethics dated 1 August 2001;
- 3.5 Code of Ethics dated 31 July 2006;
- 3.6 Corruption Act 94 of 1992."

The defendant complains that the plaintiff has failed to plead who represented the plaintiff in entering into the employment agreement with the defendant as required by Uniform Rule 18.

[7] Rule 18(6) provides that a party who relies upon a contract is required to state whether the contract is written or oral and when, where and by whom it was concluded. The test to be applied at exception stage is not whether the pleadings are compliant with the provisions of the Uniform Rules of Court, but rather whether the pleadings are vague and embarrassing or lack averments which are necessary to sustain an action or defence. The mere fact that a pleading does not comply with Rule 18 does not in itself render that pleading excipiable. As stated by Fleming DJP in *Absa Bank Ltd v Boksburg Transitional Local Council (Government of the Republic of South Africa, third party)* 1997 (2) SA 415 (W) at 418:

"If a pleading is vague and embarrassing it is excipiable because of that quality. In that event it is fortuitous if in the process of creating a vague statement of claim Court Rules were disobeyed. If there is vagueness which justifies an exception, the exception is sound whether or not the Court rule was breached. If, on the other hand, such vagueness is lacking, the exception should fail even when the party is entitled to attack the pleading as an irregular proceeding because of non-compliance with the Court Rules. That is a distinct complaint requiring different adjudication."

[8] The plaintiff's non-compliance with Rule 18 is not a relevant consideration in the determination as to whether the particulars of claim are excipiable.

[9] *Ex facie* the particulars of claim, the plaintiff has failed to comply with the provisions of rule 18(6) in that it has failed to plead who represented the plaintiff when the agreement was concluded. This deficiency, however, does not render the particulars of claim excipiable.

VAGUE AND EMBARRASSING

[10] The benchmark principles on which exceptions must be decided were recently restated by the Court in *Gallagher Group Ltd and Another v Iotech Manufacturing (Pty) Limited and Others* 2014 (2) SA 157 (GNP) at 161D-F, as follows:

"The principles relevant to the determination of an exception

[19] It is trite that the function of an exception is to dispose of the case, in whole or in part and that this avoids the unnecessary leading of evidence (see *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553F–I). An exception must therefore be determined on the pleadings as they stand, assuming the facts stated therein to be true; and no facts outside those stated in the pleading can be brought into issue and no reference may be made to any other document.

[20] Finally in order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document upon which it is based, can reasonably bear, no cause of action or defence is disclosed: failing this the exception ought not to be upheld (see *Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E–F; and see also Erasmus Superior Court Practice at B1–151)."

[11] The passage in *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E–F relied upon in the Gallagher decision reads as follows:

"In soverre daar enige twyfel hieromtrent kan bestaan, moet daar in gedagte gehou word dat die plig op die appellante as eksipiënte rus om ons te oortuig dat elke vertolking wat 'n Hof redelikerwyse aan die besonderhede van vordering kan heg, vatbaar is vir eksepsie. Sien Callender-Easby and Another v Grahamstown

Municipality and Others 1981 (2) SA 810 (OK) op 813A; Amalgamated Footwear & Leather Industries v Jordan and Co Ltd 1948 (2) SA 891 (K) op 893 en Kotsopoulos v Bilardi 1970 (2) SA 391 (K) op 395C – E”.

[12] In *Jowell v Bramwell Jones* 1998 (1) SA 836 (W) at 898 the Court set out the general principles applicable in determining whether a pleading is vague and embarrassing and therefore excipiable. The Court emphasised that an exception will not be upheld where it is directed at a particular paragraph within a cause of action. The vagueness and embarrassment must go to the whole cause of action. At 902-3, Heher J stated the following:

"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. Thus, an allegation of negligent conduct, especially where the negligence is particularised, implies that a reasonable person would not have so acted or would have acted otherwise. So, in a case involving a motor vehicle collision, it is sufficient to plead that the defendant acted negligently in particular respects. This implied that a reasonable person would not have so acted. If damage is alleged to flow therefrom, this implies in turn that there was a breach of a legal duty not to act so."

[13] As indicated in *Absa Bank v Boksburg TLC supra* at 422C-D, a pleading will not be excipiable where the party knows adequately what the plaintiff's case is and its attorneys are able to take instructions and record a meaningful response to such pleading. Our Courts have consistently emphasised that one should be circumspect when attempting to decide questions concerning the interpretation of contracts on exception. The defendant bears the onus of persuading the Court that on every interpretation no cause of action has been revealed. See *Francis v Sharp* 2004 (3) SA 230 (C) at 237D-I.

[14] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA), at para [18], the Supreme Court of Appeal summarized the current approach to the interpretation of documents as follows:

"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[15] In interpreting a document, reference may be had to evidence which may include the circumstances in which the document came into existence. See *Bothma-Batho Transport v S Bothma en Seun Transport* 2014 (2) SA 494 (SCA) at [12]. In the light of the aforesaid, it would be inappropriate to attempt to embark on an interpretation of an agreement at the exception stage, save in exceptional circumstances and only where it is clear that there is no room for the interpretation relied upon by the plaintiff.

[16] In the instant matter, the plaintiff's case is based on an agreement of employment. The defendant would be in a position to plead to allegations relating to his employment and would be in a position to address the allegations contained in the particulars of claim. In order to succeed on exception, the defendant must demonstrate not only that the particulars of claim are vague and embarrassing but also that he will be prejudiced if he is required to plead thereto. See *Venter v Wolfberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 645D.

[17] I deal with each of the complaints raised by the defendant hereunder.

[18] **Ad 1.2** - The defendant complains that the plaintiff has failed to allege who represented the plaintiff in entering into the employment agreement with the defendant.

[19] As indicated above, the failure to plead the name of the representative constitutes a breach of rule 18(6) of the Uniform Rules. I am not, however, satisfied that it renders the particulars of claim vague and embarrassing. The plaintiff relies on written documentation and has attached copies of such documents to the pleadings. The defendant can identify whether he appended his signature to the written agreement and is in a position to plead whether the terms and conditions relied upon by the plaintiff constituted terms of his employment. Annexure FNB1 to the particulars of claim is purportedly signed on behalf of E Grondel, the Chief Executive Officer of the plaintiff. The defendant can identify the representative of the plaintiff by mere reference to the document and is in a position to plead thereto.

[20] **Ad 1.4** - The defendant complains that the Articles of Agreement annexed as part of annexure "FNB1" was entered into between the defendant and First National Bank of South Africa Limited and not the plaintiff. Annexure FNB1 to the particulars of claim records an agreement between the parties. Annexure FNB1 specifically records that the Articles of Agreement form part of the defendant's agreement of employment with the Bank. *Ex facie* the particulars of claim, it appears that the terms contained in the Articles of Agreement are incorporated by reference into the employment contract. The plaintiff alleges that the Articles of Agreement referred to in the employment contract is the document attached to the particulars of claim. The defendant has thus been apprised of the plaintiff's case and is in a position to plead thereto. The discrepancy in the name of the "Bank" can be resolved through the exchange of further particulars, discovery and/or evidence. The defendant will not be embarrassed if it is required to plead thereto.

[21] **Ad 2.1** - The plaintiff pleads in paragraph 4 of its particulars of claim as follows:

"(4) The material, express alternatively implied further alternatively, tacit terms of the employment agreement included:

4.1 The defendant would take all reasonable steps to safeguard the assets of the plaintiff;

4.2 The defendant, as a senior bank official entrusted with authority to grant credit and approve lending agreements on behalf of the plaintiff, would discharge fiduciary obligations to protect the interests of the plaintiff, particularly when conducting or considering lending agreements.

4.3 The defendant would act with due care and skill and without negligence.

4.4 The defendant would act bona fide, without conflict of interest, and avoid authorising loan approvals or payments to third parties with whom he had a personal relationship.

4.5 The defendant would act only within the course and scope of his appointment and the authority given to him by the plaintiff, which authority was limited in the following relevant material respects:

4.5.1 the defendant would apply the plaintiff's Credit Policy in force at the time;

4.5.2 the defendant would not approve or authorise loans in excess of the value of the property to which the loan related;

4.5.3 the defendant would not permit payment of monies to a borrower until the loan had been secured by the registration of a mortgage bond against the property;

4.5.4 the defendant would not approve loans for use other than on the said property;

4.5.5 the defendant would check the status of the loan applicant and would not loan money to individuals who had been sequestrated or presented a similar credit risk to the plaintiff;

4.5.6 the defendant would not approve a loan or make payments under any loan unless or until an approved valuation had been conducted in respect of the property."

[22] The defendant contends that -

"Annexure FNB1 does not bear with the allegations that these were the terms of the defendant's employment and, in addition, no indication is given as to the basis upon which the said pleaded terms may be implied from FNB1 or may be described as tacit terms."

[23] Insofar as the plaintiff intends to rely on terms of the contract implied by law, it is not necessary for it to have pleaded facts which gave rise to those terms. See *Sishen Hotel (Edms) Bpk v SA Yster en Staal Industriële Korporasie Bpk* 1987 (2) SA 932 at 948-949.

[24] The determination as to whether the terms relied upon by the plaintiff constitute tacit, alternatively express terms of the agreement would by necessity entail an interpretation of the agreement.

[25] In argument the plaintiff relied on the following specific provisions of the documents to support its contention that the terms relied upon formed part of the agreement concluded between the parties:

25.1. The Articles of Agreement contains the following provisions:

"2. The Employee agrees to enter the employment of the Bank and to serve at such place and in such capacity and perform such duties as the Bank may from time to time require.

3.1 The Employee undertakes to make himself familiar with the contents of the Bank's Staff Manual as amended from time to time, and acknowledges that those terms and conditions contained therein, which are applicable to the category of employment into which he falls, shall apply to his employment and, in particular, but without derogating from the generality of the foregoing, acknowledges that the paragraphs covering hours of work, salaries, wages and allowances, leave of absence and retirement apply to his employment with the Bank.

3.2 The Employee undertakes to comply with all the rules, regulations and procedures of the Bank, however presented or conveyed or whereinsoever contained, as are applicable to him or to his duties in the Bank.

3.5 The Employee acknowledges that the due and proper observance of the aforementioned undertakings is fundamental to his relationship with the Bank and that his duties will be carried out subject to the exercise of the utmost good faith."

25.2. Clause 18 of the Articles of Agreement envisages that the plaintiff would be entitled to hold the defendant personally responsible for any damages or losses incurred by the plaintiff as a result of the defendant intentionally disregarding or negligently or intentionally exceeding his authority as a result of which the Bank suffers damages or loss.

- 25.3. The Code of Ethics, attached to the plaintiff's particulars of claim specifically prohibits a conflict of interest and provides as follows:

"A conflict of interest exists when employees in association with immediate family members have direct or indirect personal interest in, or derive benefits from, transactions to which the Group is also a party. Such situations must be avoided and prevented at all times, in the interest of honest and bona fide business practices.

Employees are expected to perform their duties conscientiously, honestly and in accordance with the best interests of the Group. Employees will therefore, not carry on business on their own account or have other conflicting interests, without full disclosure to the Group.

If employees are of the opinion that the conduct, behaviour or activity in which they are involved may constitute a conflict of interest with the Group, it should immediately be brought to the attention of the employee's immediate senior."

[26] In argument I was referred to *Phillips v Fieldstone Africa (Pty) Limited and Another* 2004 (3) SA 465 (SCA) at para [27] in support of the plaintiff's contention that a fiduciary relationship existed between the parties. As indicated in *Phillips supra*, the existence and nature and extent of a fiduciary duty are questions to be determined upon a consideration of all the relevant facts and circumstances.

[27] At this juncture, and in the absence of oral testimony, I am not in a position to determine the nature and extent of the fiduciary relationship between the parties and I am not persuaded that the terms alleged in paragraph 4 of the particulars of claim do not constitute tacit, alternatively implied, further alternatively, express terms of the agreement concluded between the parties. The terms of the agreement are sufficiently and unambiguously pleaded and I am satisfied that the defendant is in a position to plead thereto.

[28] **Ad 3** - In paragraph 4.5.1 of the particulars of claim, the plaintiff alleges that the defendant would apply the plaintiff's credit policy in force at the time. In paragraph 5A the plaintiff avers that annexure FNB 2 constituted the credit policy applicable during the relevant period. The defendant's complaint that the plaintiff has failed to plead the basis upon which the defendant would be bound by the credit policy, is accordingly devoid of substance.

[29] **Ad 4.1, 6.1 and 7** - In each of these complaints the defendant contends that the terms allegedly breached by the defendant "are not expressly contained in FNB1". The plaintiff in its particulars of claim, however, does not rely exclusively on the express terms contained in annexure FNB1. The plaintiff also relies on implied and tacit terms and on the provisions of the Articles of Agreement, Staff Defalcation letter, confirmation of receipt of Code of Ethics, Code of Ethics and the Corruption Act. The additional documentation is incorporated into the contract of employment (annexure FNB1) by reference.

[30] The terms which the plaintiff alleges the defendant has breached are the self-same terms which the plaintiff has pleaded earlier in its particulars of claim. If it is thus established by the plaintiff that the terms upon which it relies are express, implied or tacit terms of the agreement, it would be axiomatic that an allegation that the defendant breached that self-same terms would be neither vague nor embarrassing.

[31] I am not persuaded that on a proper interpretation of the agreement the plaintiff will not establish that the terms alleged by it constituted terms of the employment agreement and accordingly a breach of such terms would constitute a breach of that agreement.

[32] **Ad 5** - The defendant complains that the details of the alleged breaches of the agreement are lacking in particularity.

[33] I am satisfied that the particulars of claim contain sufficient *facta probanda* to enable the defendant to plead thereto and the particularity sought by the defendant can be obtained by means of request for further

particulars for trial. The omission of the particulars sought by the defendant neither render the pleadings vague nor embarrassing.

[34] **Ad 8** - the defendant complains that the plaintiff does not plead whether the damages allegedly suffered flow naturally from the alleged agreement or whether such damages were within the contemplation of the parties when the agreement was concluded. In circumstances where a plaintiff claims special damages, it is required to plead that special circumstances existed at the time of the conclusion of the agreement and that the damages now claimed were within the contemplation of the parties. See *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd* 1977 (3) SA 670 (A) at 687.

[35] Without pleading that special circumstances existed and that the damages claimed were within the contemplation of the parties, the plaintiff will not be entitled to recover special damages. In the absence of such allegations, one can conclude that it is the plaintiff's case that the damages it now seeks to recover are general damages which flow naturally from the kind of breach in question.

[36] The defendant is in a position to plead to the damages and I am of the view that there is no merit in this complaint.

[37] **Ad 9.1** - the defendant contends that the plaintiff has failed to "... *allege how its claim is calculated and in particular the interest charges and/or accrued, the rate of interest charged and/or accrued.*" The defendant, however, overlooks the allegations contained in paragraphs 9 and 10 of the plaintiff's particulars of claim which read as follows:

"9. In total, the amount paid by the plaintiff to Levinson (or his nominee) as a result of the defendant's breaches is R6 972 821,00 which amounts would not have been paid out if the defendant had not breached his employment agreement.

10. The defendant has been able to recover only the following amounts:

10.1 from the sale of the Parkhurst property in 2010 - R1 100;

10.2 from the sale of erf 176 Ferndale in 2010 - R500 000;

10.3 from the sale of erf 174 Ferndale in 2011 - R540 000."

[38] It is self-evident that the plaintiff seeks to recover its actual out of pocket loss being the amount it alleges it paid to Levinson, less the amount which it has recovered. I am satisfied that sufficient particularity has been provided to the defendant to enable it to plead to these allegations.

CONCLUSION

[39] In all the circumstances, the exception is dismissed with costs.

Redman AJ
Acting Judge of the High Court

Heard: 25 August 2014

Judgment delivered: 03 February 2015

Appearances:

For Plaintiff: Adv Duncan Turner
Adv Nzwisisai Dandazi
Attorneys Read Hope Phillips Thomas & Cadman Inc.

For Defendant:
Attorneys: Biccari Bollo Mariano Inc.