

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/44618

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

.....
SIGNATURE

.....
DATE

In the matter between:

KOMATSU KVX LLC

Plaintiff/ Applicant

And

ALLIED WEAR PARTS (PTY) LTD

Defendant/ Respondent

JUDGMENT

A.C. BASSON, J

[1] This is an opposed exception in terms of Rule 23 of the Uniform Rules of Court. The applicant is the plaintiff in the main action and the respondent is the defendant. I will refer to the parties as they are cited in the main action.

- [2] The plaintiff instituted action for payment of goods sold and delivered to the defendant in terms of a written agreement dated 20 May 2008. On 31 July 2014 the defendant filed a special plea, a plea on the merits and a counterclaim to the plaintiff's claim. On 21 August 2014 the plaintiff delivered a notice in terms of Rule 23(1) directing the defendant to remove the causes of complaint particularised in the notice within 15 days from date of service of the notice upon it. The defendant failed to remove the causes of complaint within the stipulated time. On 25 September 2014 the plaintiff delivered its exception to the defendant's plea.

First ground of exception

- [3] The plaintiff alleges that the defendant is liable for payment of the goods sold in terms of the "payment arrangement" pleaded at paragraphs 5 and 6 of the Particulars of Claim. The goods in issue and amounts owing in respect of those goods are reflected in the invoices attached to the Particulars of Claim.
- [4] The defendant admits the agreement and the terms thereof and also admits the terms in respect of the "payment arrangements" that arose out of certain amendments to the agreement.
- [5] Although the defendant admits the invoices relied on by the plaintiff, it denies its indebtedness on the singular basis that the goods sold and delivered were defective and were not fit for the purpose for which they were intended. More in particular, the defendant admits that it ordered new "buckets" from the plaintiff in May 2011 but pleads that the buckets did not achieve the hours as represented by the plaintiff once they were put into production in that they eroded at a rapid rate and failed prematurely.
- [6] In addition to the buckets, the defendant pleads that it is not indebted to the plaintiff for the reason that the "parts" sold and delivered were defective and not fit for the purpose for which they were intended. No particularity is pleaded as to why the other goods were defective and not fit for the purpose for which they were intended.

- [7] It is clear from the Particulars of Claim that the plaintiff claims payment in respect of a large number and variety of goods sold and delivered to the defendant and not only in respect of the buckets. In this regard it was submitted on behalf of the plaintiff that it is unclear from the plea how and on what basis the defendant is entitled to resist the plaintiff's claim for payment for all the other goods reflected in the invoices by only alleging that the "buckets" were not fit for the purpose for which it was purchased. No attempt is made to particularise the extent, if any, to which all the other goods failed to perform. It is therefore, according to the plaintiff, unclear from the plea how or on what basis the defendant can resist payment (consisting of numerous goods) when the complaint raised in the plea relates only to the alleged poor performance of the buckets. The plaintiff submitted that this feature of the plea makes it embarrassing.
- [8] It was further submitted that the prejudice caused by such a plea is manifest in that the manner in which the defence has been pleaded creates an ambiguity which makes a meaningful response impossible.
- [9] On behalf of the respondent it was submitted that the defendant has in any event pleaded - specifically in relation to the attached invoices - that it denies liability and that any amount alleged to be owing by it has been extinguished by its counterclaim. It was submitted that by reading the counterclaim the plaintiff should be fully aware of what the defendant's case is.

The second exception

- [10] The defendant also pleaded that the plaintiff had represented that the buckets would achieve certain hours which they failed to do once they were put into operation. The plaintiff submits that this allegation suggests that the defendant seeks to defend the claim on the basis of an alleged misrepresentation and that this defence requires a different response to a defence based on the breach of a tacit, alternatively, implied term.

Principles

- [11] The object of a pleading has been explained by the Court in *Dharumpal Transport (Pty) Ltd v Dharumpal*¹ as follows:

“The object, of course, of all pleadings is that a succinct statement of grounds upon which a claim is made or resisted shall be set forth shortly and concisely; where a statement is vague, it is either meaningless, or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on, and therefore it is also something which is insufficient in law to support in whole or in part the action or defence. . . .”

- [12] In this matter the complaint is directed at the plea of the defendant. It is, however, trite that defective pleadings of a plaintiff and that of a defendant are treated on an equal footing. See *Constantaras v BCE Foodservice Equipment (Pty) Ltd*:²

“[32] In an *obiter dictum* in *Priniceps (Edms) Bpk en 'n Ander v Van Heerden NO en Andere* 1991 (3) SA 842 (T) at 845 Harms J said that in the Supreme Court an unsuccessful pleader is given the opportunity to amend his so-called plea, even when that plea has been set aside because it does not disclose a defence. The *rationale* seems to be that although the defence contained in the pleading may be bad the pleading as such continues to exist. In the *Group Five Building* case (at 603F - H) Corbett CJ quoted with approval from *Johannesburg Municipality v Kerr* 1915 WLD 35 at 37 in which Bristowe J said that although the quashing of an entire declaration on exception means that it is an absolute bar to any relief being obtained on it, that 'does not take the declaration off the file or place the case in the same position as though no declaration had been delivered'. Despite the distinctions between the effects of the striking down of a particulars of claim and a plea to which I have earlier referred, it seems to me that, in principle, fundamentally defective pleadings emanating from a plaintiff and defendant should be dealt with on an equal footing. Since the rule referred to above is firmly established in relation to the defective pleading of claims we should therefore apply it *mutatis mutandis* to the flawed pleading of defences.”

- [13] An exception that a pleading is vague and embarrassing strikes at the heart of the claim or as in this case the defence. See in this regard *Jowell v Bramwell-Jones and Others*:³

“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...”

¹ 1956 (1) SA 700 (A) at 705D

² 2007 (6) SA 338 (SCA) at 349A-B

³ 1998 (1) SA 836 (w) at 905E-F

- [14] Some particularity is therefore required in pleadings and it follows that where averments in pleadings are vague and embarrassing, alternatively lacks averments necessary to sustain a defence (as is alleged in this case), a party is entitled to deliver an exception to the pleading. See in this regard *Trope v South African Reserve Bank*⁴ where the Court noted the following in respect of the degree of particularity required in pleadings:

“Rule 18(4) of the Uniform Rules of Court provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto.

It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement 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; the cause of action or defence must appear clearly from the factual allegations made (*Harms Civil Procedure in the Supreme Court* at 263-4). At 264 the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading.

The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law.”

- [15] The enquiry into whether a pleading is vague and embarrassing involves a twofold consideration: Firstly, whether the pleading lacks particularity to the extent that it is vague and secondly whether the vagueness causes prejudice. See in this regard *Trope v South African Reserve Bank*:⁵

“The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law.

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

⁴ 1992 (3) SA 208 (T) at 211A – E

⁵ *Ibid* at 211A – E

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* CC1991 (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.

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 - see *Parow Lands (Pty) Ltd v Schneider* 1952 (1) SA 150 (SWA) at 152F-G and the authorities there cited."

- [16] Pleadings considered to be vague are either meaningless or capable of more than one meaning⁶ or where a reading of the pleading leaves one guessing as to what means.⁷ Prejudice will usually be found in the fact that a defendant is unable to plead properly to the Particulars of Claim on account of the vagueness. See in this regard: *Levitan v Newhaven Holiday Enterprises* CC 1991 (2) SA 297 (C):

"Prejudice to a litigant faced with an embarrassing pleading must ultimately lie in an ability properly to prepare to meet his opponent's case."

- [17] The onus is on the excipient to show both the vagueness and the prejudice and must do so within the ambit of the pleadings. See *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T) where the Court held as follows:

"[6] The *onus* is of course on the excipient to show both vagueness amounting to embarrassment and to embarrassment amounting to prejudice. Where the excipient relies on embarrassment, such must be demonstrated by having regard to the pleadings only. The attack must arise from within the four walls of the pleading which is the source of the complaint and what is more, such embarrassment must not be frivolous, it must be substantial. See in this regard *Lockhat and Others v Minister of the Interior* 1960 (3) SA 765 (D) at 777B - H. Therefore, the ultimate test on whether an exception should be upheld is whether the excipient is prejudiced. In this regard see for instance *Levitan v Newhaven Holiday Enterprises* CC1991 (2) SA 297 (C) at 298A - J. "

⁶ *Lockhat and Others v Minister of the Interior* 1960 (3) SA 765 (d) at 777D

⁷ *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ingelyf en andere* 2001 (2) SA 790 (T)

- [18] More in particular in respect of a plea, if the pleading lacks averments which are necessary to justify a defence and where the excipient will be seriously prejudiced by a lack of particularity, an exception should be upheld. In this regard it was submitted that the defence raised in respect of the other goods is capable of two meanings and that the plaintiff is prejudiced in that it is unable to properly prepare to meet its opponent's case.

Merits

- [19] In respect of the second exception I have indicated to the plaintiff during argument that I am not persuaded that this exception has any merit. The defendant has elected to plead that there was an implied term to the agreement and has therefore pinned its colours to the mast. The plaintiff knows what the defence is and can easily plead thereto without embarrassment or prejudice.

- [20] In respect of the first exception I am persuaded that the defendant only provides particulars of the extent to which the buckets were not fit for purpose. No similar particulars are provided of the extent to which the rest of the goods were not fit for the purpose for which they were purchased. I am in agreement that it is unclear on what basis the defendant can resist payment of the entire claim consisting of numerous goods when self-evidently the complaint relates only to the alleged poor performance of the buckets. I am further persuaded that the prejudice caused by such plea is obvious: The plaintiff cannot ascertain with any degree of certainty if it should investigate whether all the goods sold to the defendant were inferior or whether it should limit its enquiries to the buckets only as no particularity is provided regarding the alleged inferiority or unsuitability of the remaining goods. In the premises I am persuaded that the first exception should succeed.

- [21] In the circumstances the following order is made:

1. The first exception is upheld with costs.
2. The second exception is dismissed.
3. The respondent is granted leave to amend its plea within a period of 20 days from date hereof.

A.C. BASSON

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Counsel for the Applicant: Adv M. Seape

Counsel for the Respondent: Adv C. Georgiades

Attorney for the Applicant: Cliffe Dekker Hofmeyr Inc

Attorney for the Respondent: Honey Attorneys

Argument took place on 20 April 2015

Judgment was delivered on 23 April 2015