

REPUBLIC OF SOUTH AFRICA



GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NO. : 2014/31136

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

DATE

SIGNATURE

In the matter between:

MERAFE MOLOTO

Plaintiff /Respondent

And

AMANI AFRICAN SPAS (PTY) LIMITED

First Defendant/Excipient

MARK LAWRENCE GORDON

Second Defendant/Excipient

JUDGMENT

OPPERMAN AJ

INTRODUCTION

[1] The plaintiff ('the respondent') has advanced three claims in her particulars of claim.

- [2] The defendants ('the excipients') contend that claims 1 and 3 are vague and embarrassing, alternatively, fail to disclose a cause of action.

EXCEPTION - VAGUE AND EMBARRASSING – LEGAL PRINCIPLES

- [3] Rule 23(1) provides that an exception may be taken against a pleading on the grounds that it is vague and embarrassing. Such an exception strikes at the formulation of the cause of action and not its legal validity.¹

- [4] This type of exception involves a twofold consideration:

4.1. First, whether the pleading lacks particularity to the extent that it is vague; and

4.2. Second, whether the vagueness causes prejudice.

- [5] A pleading may be vague if it fails to provide the degree of detail necessary in a particular case properly to inform the other party of the case being advanced.² The typical prejudice which justifies an exception is if the allegations in the particulars of claim are such that the defendant is unable to plead properly.³

- [6] The question is 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”*. In order to answer this question, the Court is *“obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him, in his*

¹ *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269I

² *Lockhat v Minister of Interior* 1960 (3) SA 765 (D) at 777D; *Nasionale Aartappelkoöperasie Bpk v PriceWaterhouseCoopers* 2001 (2) SA 790 (T) at 797J–798A

³ *Lockhat supra* at 777E

*efforts to plead to the offending paragraph, by the vagueness complained of”.*⁴

[7] The valuation of prejudice is a factual enquiry, and is a question of degree. The decision must necessarily be influenced by the nature of the allegations, their content, the nature of the claim and the relationship between the parties.⁵

[8] In *Jowell v Bramwell-Jones*⁶ this Court referred to the following general principles insofar as exceptions are concerned:

- “a. *Minor blemishes are irrelevant: pleadings must be read as a whole; no paragraph can be read in isolation;*
- b. *...*
- 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; conclusion of law need not be pleaded; ...”*

[9] In *Jowell v Bramwell-Jones*,⁷ it was also held that:

“an exception that a pleading is vague and embarrassing cannot be directed at a particular paragraph within a cause of action”. An exception “must go to the whole cause of action”.

EXCEPTION – NO CAUSE OF ACTION – LEGAL PRINCIPLES

[10] As stated in *McKelvey v Cowan* NO 1980 (4) SA 525 (Z) at 526D-E:

⁴ *Quinlan v McGregor* 1960 (4) SA 383 (D) at 393F-G

⁵ *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W) at 422A

⁶ 1998 (1) SA 836 at 902J – 903B

⁷ *Supra* at 899D

“It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.”

[11] In *Frank v Premier Hangers CC* 2008 (3) SA 594 (C) Griesel J stated as follows at para [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.”

[12] In *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) Marais JA stated as follows at para [7] 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.”⁸

THE BASIS OF RESPONDENT'S CLAIMS

Fraud inducing a contract: Legal principles

[13] A party who has been induced to enter into a contract by a fraudulent misrepresentation is entitled to rescind the contract.⁹ Such a claim is based in delict.¹⁰ The party seeking to avoid the contract is required to plead and prove a false and material representation of fact made to him with the intention that the representation would,

⁸ See also *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* 2006 (2) SA 25 (T) para [9] at 28, 29; *FNB of SA Ltd v Perry NO* 2001 (3) SA 960 (SCA) para [6] at 965; *Klokov v Sullivan* 2006 (1) SA 259 (SCA) para [15] at 265.

⁹ *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W) at 149-150

¹⁰ *Prima Toys Holdings (Pty) Ltd v Rosenberg* 1974 (2) SA 477 (CPD) at 483A-B

and indeed did, induce the conclusion of a contract.¹¹ Where reliance is placed upon a fraudulent non-disclosure, a duty to disclose should be set out.¹² Parties cannot contract out of liability for a fraudulent misrepresentation.

Claim 1

[14] In claim 1, the respondent seeks the rescission, ab initio, of the agreement that she had concluded with the excipients. In this regard, it has been pleaded that:

14.1. The parties concluded a subscription agreement on 29 November 2012 (“the agreement”).

14.2. In terms of the agreement, the plaintiff subscribed for 30 ordinary shares of R1.00 each in the authorised share capital of the company (“the subscription shares”).

14.3. The purchase consideration payable in respect of the subscription shares would be an aggregate price of R2 million (“the subscription price”).

14.4. The second excipient provided the following warranties to the respondent, which she has defined as “the representations”, all of which he contended to be true as at 29 November 2012 – being the signature date:

14.4.1. The audited financial statements of the company for the period 1 November 2010 to 31 October 2011 were drawn up in accordance with accounting principles and standards generally accepted in South

¹¹ See *Novick supra* at 149-150

¹² *Gollagh & Gomperts (1967) (Pty) Ltd v Universal Moulds & Produce Co (Pty) Ltd* 1978

Africa to fairly reflect the financial position, affairs, operations, assets and liabilities (actual and contingent) and results of the company for the period to which they relate;

14.4.2. In respect of the period between 31 October 2011 and the closing date, being 7 December 2012, there had not been any material change in the assets or liabilities of the company; the company would not have incurred any liabilities or undertaken any commitments other than in the ordinary and regular course of its business; the second excipient was not aware of any facts or circumstances relating to the affairs of the company's business and its liabilities and obligations which ought to be known to him which were not disclosed to the respondent in writing and which were of such a nature that had they been disclosed to any person in the position of the respondent, that person would not have concluded the agreement or would have concluded the agreement on materially different terms.

14.5. The representations formed an integral part of the agreement.

14.6. The second excipient made the representations in his capacity as director of the company.

14.7. The representations were material and were to the knowledge of the excipients false in that, as at 31 October 2012:

14.7.1. the Company's total current liabilities had increased from R3 221 590 as at 31 October 2011, to R4 599 795 as at 31 October 2012;

14.7.2. the Company's overdraft had increased from R483 309 as at 31 October 2011 to R1 081 232 as at 31 October 2012;

14.7.3. the Company incurred new loan liabilities in an amount of R1 375 000 and R1 066 684 in the period between 31 October 2011 and 31 October 2012;

14.7.4. the Company's net working capital position had changed between 31 October 2011 and 31 October 2012; and

14.7.5. the net profit position of the Company had changed over the period between 31 October 2011 and 31 October 2012.

14.8. In the face of the representations, the excipients had a duty to disclose the true financial position to the respondent prior to the conclusion of the agreement.

14.9. The excipients intentionally failed to disclose the true financial position to the respondent, their failure thereby constituting a fraudulent non-disclosure of material facts.

14.10. As a result of the excipients' fraudulent non-disclosure, the respondent relied on the representations and concluded the

agreement. Had the excipients disclosed the true financial position to the respondent and not intentionally omitted its disclosure, the respondent would not have concluded the agreement.

Claim 3

[15] In respect of claim 3, the respondent seeks damages, in the alternative, against the second excipient as a consequence of his fraudulent, alternatively negligent representation, which induced the respondent to conclude the agreement.

[16] As a result of concluding the agreement, the respondent alleges that she had suffered damages in the amount of R1.4 million made up by the amount she had paid to the company in partial discharge of the subscription price.

THE EXCEPTIONS

The first exception

[17] The excipients take issue with the fact that the respondent has defined the warranties provided in the agreement as “the representations”.

[18] The excipients contend that clause 8 of the agreement prescribes a specific mechanism for dealing with the breach of any contractually provided warranty. Accordingly, so contend the excipients, the respondent is confined to a remedy provided for in clause 8 of the agreement if the conditions prescribed in that clause are met.

[19] The excipients conclude that the averments pleaded in respect of claim 1 do not support the relief sought under claim 1 and do not

disclose a valid cause of action, alternatively, are vague and embarrassing.

[20] On the argument that claim 1 does not disclose a valid cause of action, the first exception fails for at least two reasons:

[21] First, the defendants cannot confine the respondent to a contractual claim. Where the same facts give rise to more than one cause of action, it is for the aggrieved party to elect which cause she wishes to advance.¹³ The respondent has elected to advance a claim premised in delict. The excipients cannot object to her election. The shortcoming in their attempt to do so is exposed in the case of *Prima Toys Holdings (Pty) Ltd v Rosenberg* 1974 (2) SA 477 (CPD). In *Prima Toys Holdings*, the plaintiff purchased the total issued share capital from the defendant in two companies. The plaintiff claimed against the defendant damages on the ground of certain alleged fraudulent misrepresentations made by the defendant prior to the conclusion of the contract alternatively a similar amount of damages on the basis of the defendant's fraudulent non-disclosure of certain facts to the plaintiff and an amount by way of a reduction of the purchase price. The excipients excepted to the first and third claims. The basis of the exception was directed at the plaintiff's first claim for

¹³ *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) at 19 ; See particularly *Lillicrap, Wassenaar & Partners v Pilkington Bros SA (Pty) Ltd* 1985 (1) SA 475 (A) at 496 where the then AD held the following of significance:

“Roman Law recognise the possibility of a *concursum actionum*, i.e. the possibility that different actions could arise from the same set of facts. More particularly, the facts giving rise to a claim for damages under the *lex Aquilia* could overlap with those founding an action under certain types of contract such as deposit, *commodatum*, lease, partnership, pledge, etc. In such a case a plaintiff was in general entitled to elect which *actio* to employ (although he could of course not receive compensation under both).”

damages founded on the excipient's alleged fraudulent misrepresentation. The representations relied upon were incorporated into the contract as warranties. Accordingly, so contended the defendant in *Prima Toys Holdings*, the plaintiff was confined to a remedy on the contract and was not entitled to found his action on representations embodied in the agreement as warranties.¹⁴

- [22] After considering various authorities, including English authorities, Van Winsen AJP (as he then was) held the following of significance:

*“As to the position in South Africa, neither authority, precedent, logic nor the requirements of public policy lead to the conclusion that merely by embodying a prior representation as a warranty in the contract the aggrieved party loses his right to a remedy in delict should it appear that the representation was fraudulently made. If the law affords a party alternative remedies and does not restrict him in the exercise of his choice I can see no reason why this Court should do so – even if in the circumstances of the particular case the measure of relief between the two remedies may well not differ.”*¹⁵

- [23] Second, the excipients misconstrue claim 1. In their heads the excipients formulate the crux of their argument as follows:

10. *Gordon and the Company except to the claim by Moloto on the basis that the pleaded case is that the allegedly fraudulent representations are ‘linked’ or undermine only the warranties provided for in the agreement.*
11. *Accordingly, if Moloto’s complaint is that the alleged fraudulent failure to disclose is tantamount to the breach of the warranties provided in the agreement (as the pleading suggests) then the*

¹⁴ At 482C-D/E

¹⁵ At 484G-I

provisions of the agreement must prevail and the relevant excipient was to be placed in mora. On the other hand, if there existed some other duty to inform regarding the state of affairs of the Company specifically as at 31 October 2012, then this is not pleaded, appropriately or at all.'

[24] During argument, Adv Milovanovic, counsel for the excipients, argued that the respondent cannot use the warranties as a spring board to establish a duty to disclose and thereby found delictual liability. She argued that there was no nexus pleaded between the warranties (being the representations) and the duty to disclose the correct financial position. I disagree. The cause of action is not a rescission of the agreement solely as a result of the representations (or warranties) being false. Instead, the cause of action is premised upon the representations, which gave rise to a duty to disclose the true financial position of the company. It is that failure by the defendants to disclose the true financial position within the factual matrix of the warranties, which amounts to a fraudulent non-disclosure and which entitles a rescission of the agreement. Counsel argued that all three exceptions hinged on a finding on this aspect. In my view, the respondent has pleaded the *facta probanda* to sustain a claim for the rescission of the agreement.

[25] I also find that the pleading is not vague and embarrassing. 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, in intelligible and lucid form and which allows the defendant to plead to it. 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 a 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 147A/B - B, E/F - F/G and H/I, 148H - I/J, 148D/E – F, 149E/F - G/H, *Jowell v Bramwell-Jones and Others* supra at 902B-D, H - I and *Koth Property Consultants* supra para [17], [18] at 30, 31. Furthermore (as per *Jowell v Bramwell-Jones and Others* supra at 902I-903E), 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 or her 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. Having found against the excipients on this front, it becomes unnecessary to deal with the other exceptions. I nonetheless address the arguments as advanced in their heads of argument.

The second exception

[26] The second exception is directed at claim 3.

[27] Its introductory paragraphs are almost identical to the first exception.

[28] As with the first exception, the excipients seek to confine the respondent to the contractual remedies prescribed in clause 8 as against the second exception and comply with the conditions prescribed in that clause.

- [29] For the same reasons set out above in response to the first exception, the excipients cannot confine the respondent to a contractual remedy where the same facts give rise to a delictual cause of action.
- [30] If the respondent had elected to sue the second excipient in terms of clause 8 of the agreement, only then would the respondent have been required to plead that the requirements in the sub-clauses to clause 8 of the agreement have been met.
- [31] This is not the respondent's cause of action.
- [32] The excipients also contend that *"it is not possible to provide a warranty negligently"*. It does not appear that this contention is a self-standing exception. If it were, it fails for the simple reason that fraud and negligence are pleaded in the alternative to each other and an exception is required to be taken to the entire cause of action, not to an alternative aspect thereof.¹⁶

The third exception

- [33] The excipients' third exception appears to be directed at claim 1.
- [34] The excipients contend that the true financial position of the company – which the respondent contends was the non-disclosure of material facts – *"could not have been known to either of the defendants until the audited financial statements of the first defendant in respect of the relevant period were finalised – well after the signature and closing dates of the subscription agreement."*

¹⁶ See *Saffer Clothing Industries (Pty) Ltd v Worcester Textiles Ltd* 1965 (2) SA 424 (C) at 429

- [35] The excipients continue that they could not have failed to disclose facts of which they had no knowledge, during the pre-contractual stage.
- [36] This is not a ground for an exception. It does not expose a defect in the pleading or the unsustainability of the cause of action. On the contrary, it is a factual averment – a defence that the excipients are required to plead and prove at a trial in due course.
- [37] In any event, it does not appear *ex facie* the particulars of claim that the excipients could not have known of the true financial position as at 31 October 2012 when they signed the agreement a month later. The converse would *prima facie* appear to be true.
- [38] Consequently, the third exception, to the extent that it advances these contentions, are rejected.
- [39] The excipients further contend that the respondent failed to make the allegation that the true financial position constitutes a material change in liabilities or that the liabilities incurred were incurred outside of the ordinary course of the company's business.
- [40] As such, the excipients contend that the respondent has failed to aver that any of the warranties have in fact been breached and consequently, the averments pleaded do not support the relief sought under claim 1 of the particulars of claim and fail to disclose a cause of action, alternatively are vague and embarrassing.
- [41] The excipients conflate what the respondent needs to plead for a cause of action founded in delict with a cause of action based on contract. The respondent is only required to make the averments contended for by the excipients in their exception if the respondent

had elected to advance a cause of action premised on a breach of a warranty.

CONCLUSION AND ORDER

[42] I accordingly make the following order : The exception is dismissed with costs.

I Opperman
Acting Judge of the High Court

Heard: 11 May 2015

Judgment delivered: 27 May 2015

Appearances:

For Excipients: Adv A Milovanovic
Attorneys: Adams Attorneys

For Respondent: Adv J Babamia
Attorneys: Bowman Gilfillan