



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

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

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DATE

SIGNATURE

Case no: 31944/2014

In the matter between:

EGOLI GAS (PTY) LIMITED

Plaintiff

And

EPIC FOODS (PTY) LIMITED

Defendant

JUDGMENT

KATHREE-SETILOANE J:

[1] This judgment concerns an exception to the plaintiff's particulars of claim on the basis that the allegations contained therein are vague and embarrassing and that it lacks averments which are necessary to sustain a cause of action. The defendant has raised seventeen exceptions, which are set out in detail in the exception. I will deal with the complaints raised in each of these exceptions in turn below.

[2] As the excipient in this matter, the defendant has the duty to persuade the Court that upon every interpretation which the particulars of claim could reasonably bear, no cause of action is disclosed and that the exception will finalise the case in whole or in part, and avoid the leading of unnecessary evidence at the trial.

[3] In so far as the defendant excepts to the particulars of claim on the basis that the allegations contained therein are vague and embarrassing, it is required to demonstrate that the particulars of claim lacks particularity amounting to vagueness which causes embarrassment, and that the embarrassment is of such a nature as to cause serious prejudice to it if the offending allegations are not expunged. Thus, for the defendant to succeed in the exception, it is required to demonstrate that the vagueness relates to the cause of action, since an exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action but it goes to the whole cause of action – which must be demonstrated to be vague and embarrassing.

The nature of the plaintiff's claim

[4] In this action, the plaintiff sues the defendant for the alleged use of “unmetered/stolen gas” The cause of action is based on a clearly pleaded written agreement, which was entered into between the parties during or about October 2000, alternatively a tacit agreement. The conduct from which the tacit agreement can be inferred is pleaded as well. It is alleged that, pursuant to the relevant agreement, the plaintiff was to supply piped distributed gas to the defendant at its usual price. Liability did not depend on metering or measuring but on consumption. It is further alleged that gas was in fact supplied/consumed and the relevant invoices are referenced. An outstanding balance in the amount of R1 295 541.52 is alleged.

EXCEPTION 1

[5] In paragraph 3 of the particulars of claim, the plaintiff relies on a written agreement entered into between the parties during or about October 2000 (“the supply agreement”). In paragraph 1 of the particulars of claim, the plaintiff is, however, identified as a company duly registered and incorporated in terms of the Companies Act No 61 of 1973, with registration number 2006/009700/07. The defendant contends that it is plain from paragraph 1 of the particulars of claim that the plaintiff company was only registered in 2006, but the plaintiff avers that a contract was entered into between the plaintiff and the defendant in October 2000. The defendant submits that this contradiction makes the plaintiff’s particulars of claim excipiable on the basis that it does not disclose the plaintiff’s *locus standi* to sue.

[6] There is no merit in this exception as the contents of paragraph 1 of the particulars of claim relate to evidence. The registration and incorporation of the Plaintiff are a matter for evidence – any number of reasons may present themselves that could explain the apparently incorrect registration number. In addition, the allegation in paragraph 3 is to the effect that the written agreement existed at all material times. These material times appear from a reading of the particulars of claim as a whole to be March to May 2014. During that time period the plaintiff (on a reasonable interpretation) was a duly registered and incorporated entity. In any event the exact nature of the legal personality of the plaintiff prior to 2006 and the existence or otherwise of the written agreement relied upon can be challenged in the plea as the particulars of claim are sufficiently particularised. Importantly, in this regard, objections to *locus standi* of a litigant to sue are more properly taken by way of a plea than by exception.¹ Accordingly, in my view, nothing in paragraphs 1 and 3 of the particulars of claim is vague, or if vague, so vague as to cause serious embarrassment.

¹ *Edwards v Woodnutt*, N.O. 1968(4) SA 184 (R) at 186C-H.

Exception 2

[7] In paragraph 4 of the plaintiff's particulars of claim, the plaintiff avers that when entering into the agreement, "...*the parties were represented by authorised officials*". The defendant's complaint is that the particulars lack a clear and concise statement of the identity of the representative of the parties to the agreement. It submits that because this is a material fact, which is required by the defendant to plead, the particulars of claim are non-compliant with Rule 18(4) of the Uniform Rules of Court, and thus excipiable.

[8] There is no merit in this complaint, because it is common practice to refer to authorised officials who acted in a representative capacity. Further particulars regarding the representatives of the parties may be furnished subsequent to a request for further particulars and/or may be traversed in the course of evidence. It can be dealt with in the plea by admission and/or confession and avoidance by for instance a denial of authority. I am accordingly of the view that nothing in paragraph 4 of the particulars of claim is vague, or if vague, so vague as to cause serious embarrassment.

Exception 3

[9] The plaintiff avers that a tacit supply agreement came into existence as a result of the circumstances set out in paragraphs 8.1 to 8.15 of the particulars of claim. The defendant contends that none of the facts pleaded in paragraph 8.1 to 8.15 of the particulars of claim supports the averments of the coming into existence of a tacit supply agreement entitling the plaintiff to payment in respect of unmetered gas, as pleaded in clause 7.3 of the plaintiff's particulars of claim. Therefore, it submits that the particulars of claim lacks averments which are necessary to sustain the conclusion that a tacit agreement with the terms as pleaded in clause 7.3 of the particulars of claim, came into existence.

[10] A written agreement may contain tacit terms. In pleading a tacit term a party need not provide further particulars except for the written agreement on which it

relies. The defendant consequently has sufficient information available to plead to the allegations contained in paragraph 6 of the particulars of claim. I am accordingly of the view that nothing is vague, or if vague, so vague as to cause serious embarrassment.

Exceptions 4 and 5

[11] Clause 3.1 of the supply agreement, which is attached to the plaintiff's particulars of claim, regulates the applicable tariff for supplied gas. It reads as follows:

'The tariffs applicable to the supply of gas of the amount as per the quote for a new quotation...'

In paragraph 6.2 of the plaintiff's particulars of claim, the plaintiff pleads that:

'[T]he initial tariffs applicable to the supply of gas is the initial quote for a new connection...'

The defendant submits that while clause 3.1 of the supply agreement fixes the price for gas at an amount determined by the tariffs applicable at the time of a new quotation, paragraph 6.2 of the plaintiff's particulars of claim introduces the word "initial" into the equation which clearly suggests the applicable tariff of the new quotation to be subject to subsequent changes. The defendant contends that if paragraph 6.2 of the plaintiff's particulars of claim is read together with paragraph 6.3 thereof, which reads " [t]he applicable tariff from time to time would be the Plaintiff's usual price applicable from time to time in respect of the industrial supply of natural piped distributed gas", it is clear that the plaintiff relies on an entitlement to amend the applicable tariff "from time to time". The defendant accordingly contends that there is a contradiction between the plaintiff's particulars of claim and the supply agreement relied upon in support of the averments contained in the particulars of

claim, thus making the particulars of claim vague and embarrassing and hence excipiable.

[12] As pointed out by the plaintiff, the complaint raised in this exception appears to focus on a slight difference in wording between the actual clause 3.1 of the agreement and the way the clause is pleaded in the particulars of claim. This complaint, in my view, does not go to the root of the cause of action, and is therefore not excipiable. Paragraph 6 of the particulars of claim clearly includes tacit terms in sub-paragraphs 6.3. and 6.11. Therefore, in so far as the pleaded wording in the particulars of claim differs from the actual wording in the agreement, it can reasonably be regarded as tacit. However, on consideration of paragraph 6 of the particulars of claim as a whole, it is clear that the tariffs were to be based on the plaintiff's usual price.

[13] The tacit term pleaded in paragraph 6.3 of the particulars of claim relates to tariffs applicable from time to time, whereas clause 3.1 of the written agreement relates to a quote for an initial tariff. A tariff applicable from time to time may include an initial tariff. There is consequently no conflict between the written agreement and the particulars of claim or between paragraphs 6.2 and 6.3 thereof. This tacit term pleaded in paragraph 6.3 is in any event not a term which can be interpreted at the exception stage, as courts are reluctant to decide upon exception, questions concerning the interpretation of a contract. I am, therefore, of the view that there is nothing vague, or if vague, so vague as to cause serious embarrassment.

Exceptions 6 and 7

[14] In paragraph 6.4 of the plaintiff's particulars of claim, the plaintiff pleads that the defendant would be presented with a monthly invoice for gas consumption which invoice "...*would serve as written record on which the Defendant would find...*" specific information. The particulars of claim list a number of items of information that would allegedly appear on the invoices. The plaintiff relies on clause 3.2 of the supply agreement in support of the averment contained in this paragraph of the

particulars of claim. In paragraphs 9 and 11, the plaintiff then quantifies the value of the “metered gas” and “unmetered/stolen gas” with reference to “pro forma” invoices. However, the defendant’s complaint is that the attached invoices, namely “POC2”, “POC3”, “POC4” and “POC5” respectively, do not contain the particularity as pleaded in paragraph 6.4 of the plaintiff’s particulars of claim.

[15] The complaint in this exception appears to be that the pro-forma invoices attached to the particulars of claim lack particularity as required by clause 3.2 of the written agreement. I agree with the contention of the plaintiff that pro-forma invoices do not equate to the invoices contemplated in clause 3.2 of the agreement. They are merely illustrative of the cause of action. Actual invoices may be discovered and proved. As such the complaint is totally vacuous.

[16] Moreover, and as a matter of interpretation, the contents of clause 3.2 of the agreement are *prima facie* merely directory and consequently the invoices attached to the particulars of claim (even if actual and not pro-forma) may be addressed in the plea without the necessity of clarification and/or amendment to the particulars of claim. In any event and as indicated previously, the correct interpretation of clause 3.2 of the supply agreement cannot be determined at the exception stage. I am accordingly of the view that the complaint does not go to the root of the cause of action, and that nothing in paragraph 6.4 of the particulars of claim is vague, or if vague, so vague as to cause serious embarrassment.

Exception 8

[17] In paragraph 6.6 of the particulars of claim, the plaintiff avers that the quantity of gas for which the plaintiff had to be paid would be determined with reference to the meter applicable to the supply point which would constitute conclusive evidence of the quantity of the gas consumed at the supply point. The defendant complains that this term of the supply agreement is in conflict with the averment in paragraph 6.11 of the particulars of claim in which the plaintiff avers that the defendant would be liable for gas consumed “...through unauthorised means...”. The defendant

contends that the plaintiff's particulars of claim discloses no basis for the alleged tacit term of the agreement and conflicts with the written supply agreement. The defendant accordingly contends that the plaintiff's particulars of claim lacks averments necessary to sustain the claim and/or is vague and embarrassing.

[18] I am of the view that there is no conflict between the terms pleaded in paragraph 6.6 and 6.11 of the particulars of claim. Clause 5.1 of the agreement (which is pleaded in paragraph 6.6 of the particulars of claim) relates to an evidentiary mechanism whereas 6.11 of the particulars of claim relates to liability for unauthorised gas usage. As pointed out by the plaintiff, clause 5.1 is, in any event, not applicable where the meter is found to be inaccurate. Theft of gas will result in an inaccurate reading. This complaint is therefore without merit, as it does not go to the root of the cause of action, and nothing in paragraphs 6.6 and 6.11 of the particulars of claim is vague, or if vague, so vague as to cause serious embarrassment.

Exception 9

[19] The plaintiff relies on a written supply agreement, which was entered into between the authorised officials of the parties. The purported agreement attached to the plaintiff's particulars of claim as "POC1" contains no signature of any of the parties. The complaint of the defendant is that the plaintiff's particulars of claim lacks averments in support of the plaintiff's reliance on an unsigned written agreement having been entered into between the parties, and for that reason the plaintiff's particulars of claim are vague and embarrassing or lack the averments necessary to sustain the plaintiff's action.

[20] I am of the view that the complaint raised in this exception has no legal foundation because a written agreement does not have to be signed in order to be valid and enforceable. This is a matter for evidence regarding consensus. Importantly, in this regard, a writing which embodies the agreement of the parties and to which both have expressly consented but have not signed is as capable of being described as a written contract as one which is signed by both parties. The

signing of the writing is merely one way of signing assent to its terms. Notably, a contract is required to be reduced to writing and signed by both parties only where the parties make that a requirement for the existence of their contract. Accordingly, I find that the complaint does not go to the root of the cause of action and nothing is vague, or if vague, so vague as to cause serious embarrassment.

Exception 10

[21] In paragraph 6.10 of the particulars of claim, the plaintiff avers that “...*the defendant would be informed in writing of the new price ...of gas during the existence of the supply agreement.*”. The defendant’s complaint is that the plaintiff’s particulars of claim lack any averments from which the initial price and the averred “new price” are to be determined. In addition, the defendant contends that the plaintiff’s particulars of claim lack any averment of the defendant having received a written notice of a new price for gas supplied. The defendant accordingly submits that the plaintiff’s particulars of claim lack averments which are necessary to sustain the action.

[22] The contents of clause 5.5 (pleaded in paragraph 6.10 of the particulars of claim) deals with informing the defendant about a price increase. As such, clause 5.5 is inapplicable as no price increase has been pleaded. Clause 5.5 is in any event merely directory. In so far as a price increase may have occurred it is clear from the particulars of claim as a whole that it would still resort under the rubric of the plaintiff’s usual price. Accordingly, I am of the view that the complaint does not go to the root of the cause of action and nothing is vague, or if vague, so vague as to cause serious embarrassment.

Exception 11

[23] In paragraph 7 of the plaintiff’s particulars of claim, the plaintiff avers as a second alternative to its reliance on a written agreement, that a tacit supply agreement came into existence. The defendant’s complaint is that the plaintiff’s particulars of claim lack the averments to support the coming into existence of such

an alleged tacit supply agreement within the ambit of the terms pleaded in paragraphs 7.1, 7.2 and 7.3 of the plaintiff's particulars of claim, and therefore the plaintiff's particulars of claim are vague and embarrassing and/or lack averments that are necessary to sustain the action.

[24] There is no merit to this complaint as the contents of paragraph 7 of the particulars of claim are unobjectionable. It broadly delineates the existence and origin of a tacit agreement as well as its terms. The particulars of claim as a whole make clear what conduct will be used to establish the existence of a tacit agreement. In this regard, full particulars are provided in paragraph 8 of the particulars of claim. Accordingly, I am of the view that the complaint does not go to the root of the cause of action and nothing is vague, or if vague, so vague as to cause serious embarrassment.

Exceptions 12 and 13

[25] In paragraph 7.3 of the particulars of claim, the plaintiff avers, in the alternative and in the event of it being found that a written supply agreement did not come into existence, that all consumed gas, whether metered or not, would become due and payable in accordance with the plaintiff's usual price. The defendant contends that the plaintiff's particulars of claim lack averments which are necessary to sustain these allegations as no facts are pleaded on which a tacit supply agreement with these terms came into existence, thus making the plaintiff's particulars of claim excipiable.

[26] In addition the defendant contends with reference to paragraphs 6, 7 and 8 of the plaintiff's particulars of claim that the plaintiff is relying on actions of the defendant that, if proven, may support a claim based on delict, but the plaintiff is, however, suing the defendant in contract. For these reasons, the defendant contends that the plaintiff's particulars of claim are vague and embarrassing and/or lack the averments necessary to sustain the plaintiff's action.

[27] These complaints are lack substance, because as correctly pointed out by the plaintiff, the tacit agreement adequately covers the consumption of unmetered gas by virtue of the allegation of a term that the defendant would be liable for the consumption of any gas supplied via the plaintiff's system. On a reasonable interpretation of the particulars of claim, it is clear that such consumption includes unmetered consumption. There exists no need for a delictual claim – it is in any event the plaintiff's prerogative to choose its remedies. There is consequently no merit in this complaint. In any event the complaint does not go to the root of the cause of action and nothing is vague, or if vague, so vague as to cause serious embarrassment.

Exception 14

[28] The plaintiff claims payment in respect of unmetered gas consumed. Paragraph 9 of the plaintiff's particulars of claim, however, contains particularity of the quantification of the metered gas. The defendant's complaint is that when paragraph 9 is read together with the remainder of the plaintiff's particulars of claim, it becomes clear that the particulars of claim convolute the defendant's liability with regard to metered gas and its liability in respect of unmetered/stolen gas. The contention thus advanced is that the plaintiff's particulars of claim contain multiple irrelevant averments which confuse the issue and causes embarrassment to the defendant. Accordingly, the defendant submits that the plaintiff's particulars of claim are excipiable.

[29] The plaintiff contends that in order to calculate an amount due and payable in respect of specified gas consumption it is inevitable and essential to adequately calculate all payments received in respect of all gas supplied, and it is, therefore, necessary, to allege and prove supplies and payment in respect of such supplies consequent upon both metered and unmetered gas. I agree. Accordingly, I find that the complaint does not go to the root of the cause of action and nothing is vague, or if vague, so vague as to cause serious embarrassment.

Exception 15

[30] Paragraphs 10 and 11 of the plaintiff's particulars of claim seek to quantify the unmetered/stolen gas consumption. The defendant, however, contends that these paragraphs lack any averments on which the quantification of the unmetered gas use is based and therefore lacks averments which are necessary to sustain the claim, thus making the averments in these paragraphs excipiable.

[31] The contents of paragraphs 10 and 11 of the particulars of claim are, in my view, matters for evidence, and they are adequately pleaded for the purposes of preparing a plea. Accordingly, I find that this complaint does not go to the root of the cause of action and nothing in paragraphs 10 and 11 of the particulars of claim is vague, or if vague, so vague as to cause serious embarrassment

Exception 16

[32] In paragraph 13 of the plaintiff's particulars of claim the plaintiff avers that the amount outstanding to the plaintiff totals R1,295,541.52. However, in paragraph 14 of the plaintiff's particulars of claim the plaintiff avers that the defendant is owing an amount of R1, 296,401.37 to the plaintiff. The defendant complaint is that because of the discrepancy in these two figures, the plaintiff's particulars of claim are vague and embarrassing.

[33] As contended for by the plaintiff, on any reasonable interpretation of these paragraphs in the particulars of claim, and when particular regard is had to the calculation and prayers therein, it is obvious that the figure in clause 14 is a typographical error. The complaint does not, in my view, amount to an excipiable failing of the particulars of claim as it does not go to the root of the cause of action and nothing is vague, or if vague, so vague as to cause serious embarrassment. In any event, oral application can be made at any time (for instance at the hearing) to correct the figure of R1 296 401.37 in paragraph 14 to read R1 295 541.52.

Exception 17

[34] With reference to prayer (b) of the plaintiff's particulars of claim, the defendant's complaint is that it is unclear on what basis the plaintiff claims that the payment claimed became due from the 1st July 2014. Accordingly, the defendant contends that the plaintiff's particulars of claim are vague and embarrassing.

[35] There is no merit in this complaint as the contents of prayer "b" of the particulars of claim are a matter for evidence. Accordingly, I am of the view that the complaint does not go to the root of the cause of action and nothing is vague, or if vague, so vague as to cause serious embarrassment.

[36] In the premises, I find that the defendant has failed to discharge the duty to make out a case that no cause of action is disclosed on any interpretation of the particulars of claim. In my view, the particulars of claim reasonably bears only one interpretation, namely that a cause of action is disclosed based on an agreement of sale. Simply put: goods were sold and delivered. The exception accordingly falls to be dismissed with costs.

[37] In the result, I make the following order:

- (1) The exceptions are dismissed.
- (2) The defendant is ordered to pay the plaintiff's costs.

F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Plaintiff: Mr Clive van der Spuy

Instructed by: Lanham-Love Attorneys

Counsel for the Defendant: Mr D Dorfling SC

Instructed by: ST Attorneys (Sikander Tayob)

Date of Hearing: 28 July 2015

Date of Judgement: 18 September 2015