REPUBLIC OF SOUTH AFRICA

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

CASE NO: **A3111/2015**

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

Date: **WHG VAN DER LINDE**

In the matter between:

Qantam Risk Assessment (Pty) Ltd	**Appellant**
And	
McLoughlin, Cynthia	**Respondent**

JUDGMENT

Van der Linde, J:

Introduction

[1] This is an appeal against a judgment of the magistrates' court[1] given against a defendant who wished to present evidence but was precluded from doing so on the basis that its plea, even if evidence supported its assertions, would not avoid judgment in the plaintiff's favour. The defendant is now the appellant before us.

[2] The respondent's case was for payment in terms of a written agreement between the parties. She was first employed by the appellant but their relationship turned sour and resulted in claims being made reciprocally. Those claims led ultimately to a written settlement agreement being concluded between the parties. In terms of the agreement the appellant was obliged to pay the respondent the aggregate amount of R245,670.23.

[3] Further, the agreement was stated to be a settlement of all claims arising reciprocally from the termination of the employment relationship between the parties, *"and otherwise".* When sued for the balance of R167,928.33[2] allegedly owing to her, the respondent was met with a plea of admission of liability but payment by set-off.

[4] The set-off raised by the appellant was said to arise from a decision taken by the appellant to recover from the respondent all legal costs disbursed by the appellant on behalf of the respondent in connection with legal proceedings in which the respondent had been involved. That amount, in the aggregate R162,085.00, was sufficient to extinguish the appellant's indebtedness to the respondent under the settlement agreement.[3]

[5] At the commencement of the trial in the court a quo, the respondent opened her case by arguing that the matter could be disposed of without evidence. The argument was that the appellant in fact admitted the respondent's claim; that the set-off claimed in the plea was not properly pleaded since all the elements required to be shown had not been asserted; that the claim relied on for the set-off was in any event no sustainable cause of action since

---

[1] For the district of Johannesburg North, held at Randburg, by magistrate S Le Roux, on 31 August, 2015.

[2] The parties were agreed that R8,258.84 had to be deducted from the appellant's obligation to the respondent, pursuant to a tax directive issued by SARS. This meant that the respondent's claim would have to be reduced to R159,669.49.

[3] By a margin positive for the appellant of R2,415.51. There was no counterclaim for this amount.

it was reliant simply on a resolution by the appellant; and finally that in any event set-off could not successfully be raised without the appellant instituting a counterclaim for the amount of the asserted set-off.

[6] The court a quo held in favour of the respondent on the basis that the amount which the appellant sought to set-off against its indebtedness against the respondent was not for a liquidated amount of money. A counterclaim was necessary to render it liquidated, and there was none such. It accordingly gave judgment for the respondent in the amount claimed. It did not afford the appellant an opportunity of leading evidence or of amending its plea.

[7] On appeal, the respondent defended the judgment of the court a quo on the same bases as was argued before it. The appellant in turn attacked the judgment also on the same bases as was raised in the court below. In addition, however, it argued that the finding of the court a quo was equivalent to the upholding of an exception that the plea disclosed no defence, and that in those circumstances the court a quo should have afforded the appellant an opportunity to amend its plea as it may have been advised.

<u>The respondent's submissions</u>

[8] The first submission, that all the elements for a valid set-off had not been averred, is incorrect. Set-off is successfully invoked when the reciprocal debts are due and owing between the same parties, and are for liquidated amounts.[4] Nothing further is required. These elements were all averred.[5]

[9] The second submission, that the resolution does not found a cause of action, is only correct as far as it goes. The appellant's claim in the plea was however not founded on the

[4] Mahomed v Nagdee, 1952 (1) SA 410 (A); Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd, 2000 (4) SA 598 (C).

[5] See plea, paragraphs 4.2 to 4.5, p114.

resolution; the resolution merely conveyed that the appellant had taken a decision to claim back moneys that were owed to it by the respondent.[6]

[10]The true basis on which the moneys were owing by the respondent to the appellant, was that the appellants had paid on the respondent's behalf an indebtedness of hers, being legal fees incurred by the respondent. The sting of the plea, and the set-off, lay not in the resolution; the sting lay in the assertion that the moneys had been expended by the appellant on the respondent's behalf; and the appellant had resolved to claim it back.

[11]Granted, the cause of action for repayment could have been pleaded fuller; and specifically *negotiorum gestio*, the likely quasi-enrichment claim, should have been pleaded fuller, as we now hold.[7] But the asserted indebtedness is not self-evidently baseless, as the respondent contended. If the pleading was vague in this respect, as in our view it was, the remedy was an exception, as was in fact employed by the respondent; but successful exceptions lead to an opportunity to amend, not automatically to judgment for the excipient. We return to this matter below.

[12]The third argument, that there should have been a counter-claim, is not unqualifiedly correct. Set-off, if successfully invoked, is no less than an affirmation of a legal position that will have incepted automatically; if the required elements are present, set-off occurs without more, and no further action on the part of either debtor or creditor is required. No counter-claim is required.

[13]Of course, if the amount sought to be set-off is not liquidated, and the court a quo found, then a judgment on a counterclaim will render it so. But that was not the respondent's case and an opportunity to amend (to include a counterclaim) was not afforded.

Not liquidated?

[6] Or at least that is what certainly one reasonable reading of the plea conveys.
[7] Turkstra v Massyn, 1959(1) SA 40 (T) at 47.

[14] The court a quo held that the amount claimed by the appellant from the respondent was not liquidated, and for this reason set-off could not have been invoked. There are, to my mind, three difficulties in the way of this reasoning.

[15] First, the conclusion was reached without evidence. The court had no way of knowing whether the amounts expended were not capable of prompt and ready ascertainment. These amounts may even have been agreed, in which event they were clearly liquidated. The point is, whether or not they were liquidated depended on their composition, and without evidence that was not established.

[16]The second difficulty is that the appellant's assertion was in fact that the indebtedness was comprised of the amounts expended.[8] This did not depend on whether or not these amounts were reasonable. The appellants had, in effect, paid the respondent's bills, and had decided to look to the respondent for reimbursement. Reasonableness does not come into it.

[17]But third, even if the reasoning was sound, it is an accepted and firm principle of our law of procedure that if a court finds that a party's case as pleaded does not afford a case or a defence, then that party is afforded an opportunity to re-assess its case. And it is to this aspect of the appeal that we now turn.[9]

<u>Opportunity to amend?</u>

[18]The argument raised by the respondent at the commencement of the trial was not formally called an exception. But in substance it was. The respondent argued that the case could be decided against the appellant without evidence, because the plea as it stood, even if all the admissible evidence was led, would not afford a successful defence against the respondent's

[8] See plea, paragraphs 4.2 and 4.3, p114.

[9] Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs), 1993 (3) SA 264 (A) at 269H. See also Rowe v Rowe, 1997 (4) SA 160 (SCA) at 167H.

claim. That argument was, albeit for slightly different reasons, upheld by the magistrate, who made a costs order commensurate with an exception having been taken.[10]

[19]The reason underlying the principle that a party is first afforded an opportunity to amend, is that otherwise a final judgment issues against a party without that party having had a reasonable opportunity to be heard. The principle was expounded as follows by the then Chief Justice Corbett in the Supreme Court of Appeal in Group Five:[11]

"An order dismissing an action puts an end to the proceedings and means that if the plaintiff wishes to pursue his claim on a different pleading he must start de novo. This may have drastic consequences for the plaintiff, particularly where it results in the prescription of the claim. In my opinion, it would be contrary to the general policy of the law to attach such drastic consequences to a finding that the plaintiff's pleading discloses no cause of action. Here the analogy of a defective summons springs to mind. And the cases of Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) and Prudential Assurance Co Ltd v Crombie 1957 (4) SA 699 (C) illustrate the reluctance of the Courts to deny the plaintiff the opportunity to amend his summons, even if fatally defective by reason of its failure to state a cause of action.

Moreover, in my view, in this regard no distinction should be drawn between the case where action is initiated by way of summons, followed by a declaration, and the case where the plaintiff sues out a combined summons. In the judgment in the case of Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others 1991 (3) SA 795 (N) there are certain dicta (at 800F-801C) which suggest that a distinction must be drawn between these two cases; that an exception successfully taken to a declaration may leave the summons standing as an 'empty husk' to sustain the action; but that in the case of a combined summons the setting aside of the particulars of claim as a consequence of a successful exception causes the whole action to fall away because the summons can have no

[10] See Reasons, dated 3 September 2016, p204, sub nom *"On costs"*.
[11] Op cit, p602 in fin to p604.

existence independent of the particulars of claim. It would seem to be a corrollary to these propositions that when an exception is successfully taken to the particulars of claim in a combined summons on the ground that no cause of action is disclosed, there is no room for the grant of leave to amend the particulars. This, in my opinion, does not constitute the law and practice of our Courts. As long ago as 1915 Bristowe J put the position thus:

'As was said by Innes CJ in Coronel v Gordon Estate GM Co Ltd (1902 TS 112 at 115) "the effect of a successful exception is that the entire declaration is quashed", meaning as I understand that it is an absolute bar to any relief being obtained on that declaration. But it does not take the declaration off the file or place the case in the same position as though no declaration had been delivered. Otherwise the proper order when an exception is upheld would be to extend the time for filing a declaration, not to give leave to amend. Leave to amend presupposes that there is something which can be amended. Still less can it be said that a successful exception destroys the action. If this were so then the case of Curry v Germiston Municipality (1910) LLR 122, where an order for absolution under Rule 41 was granted after a declaration had been successfully excepted to and had not been amended, would have been wrongly decided. It seems to me therefore that the action in the present case is still on foot and that there is a declaration in existence.'

Johannesburg Municipality v Kerr 1915 WLD 35 at 37; see also Berrange v Samuels II 1938 WLD 189; Santam Insurance Co Ltd v Manqele 1975 (1) SA 607 (D) at 608B-D, 609G-610D.

And I would again refer to the cases quoted above in regard to the amendment of a defective summons. A Circuit Court summons is, and in the Cape previously was, similar to a combined summons. Although the point was not debated in that case, Gillespie v Toplis and Another 1951 (1) SA 290 (C) provides an instance of a Circuit Court summons being set aside on exception on the ground that it failed to disclose a cause of action and of leave being granted to the plaintiff to file an amended summons, if so advised.

For these reasons I hold that Streicher J erred in dismissing the action. He should have set aside the particulars of claim and given leave to amend or, at any rate, after delivery of judgment given the appellant the opportunity to apply for leave to amend."

[20]This reasoning applies, in our view, with equal force to the case of an exception against a plea on the basis that it discloses no defence. As we have indicated, in our view the quasi-enrichment claim has not been properly pleaded. The plea is vague and embarrassing in this regard, because the claim relied on has not been asserted with appropriate particularity. It may even be that those disbursements were incurred pursuant to an agreement to repay them, in which event the claim would be founded in contract; but the pleading does not disclose this.

[21]In this case there is of course also the argument that the settlement agreement forecloses the entitlement of the appellant to recover any money from the respondent, and that on this basis too the plea is excipiable as disclosing no defence. We considered whether the appeal should be dismissed on this basis, but on reflection this point was not fully canvassed either before us or before the court a quo, and it would be inappropriate as a court sitting on appeal to express a firm view on this issue, either way.

[22]We prefer to conclude then that the exception was well taken; that the plea was vague and embarrassing for not having pleaded the cause of the respondent's asserted indebtedness with appropriate clarity; but that the court a quo, having upheld the respondent's submissions, should then have afforded the defendant an opportunity to amend its plea.

[23]In the result the appeal must succeed. We make the following order:

(a) The appeal succeeds, with costs.

(b) The order of the court a quo is set aside, and the following order is substituted for it:

"(i) The plaintiff's exception against the defendant's plea as disclosing no defence is upheld, and the plea is set aside.

(ii) The defendant is afforded 15 days within which to amend its plea.

(iii) The trial of the action is postponed sine die.

(iv) The defendant is directed to pay the costs of today as on exception."

WHG van der Linde
Judge, High Court
Johannesburg

I agree.

A Mayet
Acting Judge, High Court
Johannesburg

For the Appellant: Adv. M. Nowitz (082 444 9716)
Instructed by: Larry Dave Attorneys Incorporated
22 Hurlingham Road
Cnr Fricker Road, Illovo Boulevard
Illovo
Tel: 011 268 6512
Ref: QAN001/Nicole Purwitsky / Teboho Mokoena

For the respondent: Adv. T. Lipshitz (083 383 5511)
Instructed by: M Van Zyl Attorneys
Standard Building
1st Floor, Room 18
304 Oak Avenue
Randburg
Tel: 011 781 2810
Ref: MVZ/bg/M390

Date argued: 18 April, 2016
Date of judgment: 29 April, 2016