

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO. CA 18/2019

Date heard: 15 August 2019

Date Delivered: 29 August 2019

In the matter between:

PROTEA CHEMICALS

A division of the OMNIA GROUP (PTY) LTD

Plaintiff

and

FLEXICON AFRICA (PTY) LTD

Defendant / Excipient

JUDGMENT

RUGUNANAN, AJ:

[1] These are exception proceedings. The plaintiff claims from the defendant (the excipient) restitutionary damages in the amount of R1 628 030, 00 against a tender for the return of certain equipment manufactured and delivered by the defendant to the plaintiff. The parties are cited as companies with limited liability. The claim arose *ex contractu* on 27 January 2015 upon the conclusion of a written agreement between the authorised representatives of the parties.

[2] The salient allegations in the particulars of claim¹ which incorporate by reference the “standard terms and conditions” of the parties’ agreement attached thereto as annexure “POC2”, are set out hereunder:

¹ As amended (per Filing Notice date stamped 14 May 2019)

- “7.4 In terms of clause 10 of the standard terms and conditions the plaintiff undertakes to notify the defendant in writing of all defect (sic) within fifteen (15) days upon receipt of the goods.*
- 8 The Plaintiff duly complied with all its obligations in terms of the agreement between the parties.*
- 9. On or about 7th of September 2015 the Defendant delivered the equipment to the Plaintiff at the delivery location.*
- 10. On or about 19th of January 2016 the defendant’s authorised technicians arrived on site to assemble and install the equipment. During the installation process it became apparent that the equipment had a defect, furthermore such defect impaired the equipment’s utility and / or effectiveness for the purposes for which it was sold, alternatively, for which it was intended to be used for.*
- 11. The defects in the equipment were present at the time of sale, alternatively, during the design and building of the project, alternatively, during the assembly of the object.*
- 12. ...*
- 13. The defects in the equipment were latent, in that only upon installation of the product would the defects be noticeable and were not identifiable before the final assembly of the object.*
- 14. At all material times the Plaintiff was unaware, nor could reasonably have know (sic) about the defects in the equipment prior to installation.*
- 15. ...*

16. *During or about January 2016 the Plaintiff notified the Defendant in writing as to the breach and notified the Defendant to remedy the same. In spite of various attempts by the Defendant to remedy the breach, the equipment does not function in accordance with quoted specifications.”*

- [3] Clause 10 of the “standard terms and conditions” mentioned in paragraph 7.4 the particulars of claim records the following:

“NOTICE OF CLAIMS: Immediately upon receipt of the products, purchaser must inspect same. All claims, including claims for alleged defective goods, must be made to FAL in writing within fifteen (15) days after receipt of shipment or purchase. All claims not made in writing and received within the time specified above shall be deemed waived. Purchaser expressly hereby assumes all liability for all damages and injury occurred before and after said time period if notice is not made within the required time frame ...”

- [4] In paragraph 3 of its Notice of Exception dated 1 April 2019, the defendant’s exception is noted on the ground that the plaintiff’s particulars of claim are vague and embarrassing. The exception is composed along these lines:

- “3. 3.1 *In paragraph 7.4 of the Particulars of Claim the Plaintiff pleads that in terms of Clause 10 of the Standard Terms and Conditions, the Plaintiff undertakes to notify the Defendant in writing of all defects within fifteen (15) days of receipt of the goods.*

3.2 *It is evident from Clause 10 of the Standard Terms and Conditions annexed to the Particulars of Claim that it further records that all claims for defective goods not made within fifteen (15) days of receipt of the goods, shall be deemed waived.*

3.3 *In paragraph 9 of the Particulars of Claim the Plaintiff alleges that it received the equipment / goods on 7 September 2015.*

3.4 *In paragraph 16 of the Particulars of Claim the plaintiff alleges that it notified the defendant of the breach in writing during or about January 2016, outside the fifteen (15) day period required by clause 10.*

3.5 *The plaintiff fails to allege any basis upon which the deemed waiver in clause 10 of the Standard Terms and Conditions would not and / or does not, apply.*

3.6 *In the circumstances the ... the Particulars of Claim are vague and embarrassing in the foregoing respects and excipiable.”*

LEGAL PRINCIPLES

- [5] The object of pleadings is to define issues and to enable parties to come to trial prepared to meet each other's case and not be taken by surprise.² An exception is a legal objection to an opponent's pleading. It complains of a defect inherent in the pleading.³ On the assumption that the facts stated in the pleading are correct, an exception must be determined on the pleading as it stands; and no facts stated outside those mentioned in the pleading can be brought into issue nor can reference be made to any other document.⁴
- [6] In deciding exceptions based on vagueness and embarrassment arising from a lack of particularity, the approach is that in each case the court has to look at the matter from the point of view of the party who is faced with a pleading and ask itself how is the party to know what case it is called upon to meet. If it appears that the pleading is vague (i.e. it is either meaningless or capable of more than one meaning, or can be read in any of a number of ways) it simply means that the reader is unable to extract a single, clear meaning.⁵

² *Trope v South African Reserve Bank and Another* 1992 (3) SA 208 (TPD) at 210 H; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 W at 898 G-J

³ Erasmus, *Superior Court Practice*, Vol 2 at D1-293 [Service 4, 2017]

⁴ *Gallagher Group v IO Tech* 2014 (2) SA 157 (GNP) at 161 D

⁵ *Venter & Others NNO v Barritt; Venter & Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) paragraphs [11] and [12]

- [7] Where vagueness is present, as in the abovementioned sense, the court must undertake a quantative analysis of such embarrassment which the excipient can show has been caused by the vagueness complained of in its endeavour to plead to the offending pleading.⁶
- [8] The *onus* is on the excipient to demonstrate both vagueness amounting to embarrassment and embarrassment amounting to prejudice, and in applying the above principles the ultimate test as to whether or not an exception should be upheld is whether the excipient is prejudiced.⁷

THE ARGUMENTS

- [9] I turn to a consideration of the arguments presented by the parties. Mr Nepgen who appeared for the defendant submitted that clause 10 of the “standard terms and conditions” imposes the obligation on the plaintiff immediately upon receipt of the products (i) to inspect same, and (ii) to give notice of any defects to the defendant (FAL) within 15 days after receipt of the goods. In the event notice in writing is not given within the stipulated period, the relevant clause indicates that the claim shall be deemed waived, and the plaintiff shall assume all liability for damages and injury occurring before and after the 15 day time period.
- [10] Referring to the particulars of claim where the allegation that the plaintiff has complied with all its obligations in terms of the agreement appears, Mr Nepgen submitted that this allegation contradicts the plaintiff’s further allegations that the goods were received on 7 September 2015 and that notice to the defendant to remedy defects was given during January 2016. This construction of the particulars of claim conveys that the waiver in clause 10 of the “standard terms and conditions” had long taken effect.
- [11] In response, Mr White who appeared for the plaintiff submitted that the plaintiff inspected the goods in January 2016; it was from then that the 15 day notification period in clause 10 started running. On this point he submitted that

⁶ *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393 F

⁷ *Quinlan v MacGregor supra* at 377 H

the clause had already been complied with when the defendant's technicians arrived on 19 January 2016; consequently waiver had not interceded. I have difficulty with this submission. Nowhere in the foregoing extracts of the particulars of claim is it expressly alleged that "*the plaintiff inspected the goods in January 2016*". In this regard the submission in my view does not pass the test (*supra*) for extracting a single clear meaning.

[12] In addition, Mr White contended that the basis of the exception is flawed since it is premised on an *in vacuo* application of clause 10. He urged that clauses 8 and 10 of the "standard terms and conditions" ought to be read in conjunction with the "Lifetime Performance Guarantee" clause in the quotation⁸ supplied by the defendant to the plaintiff prior to the parties' conclusion of their agreement. It was argued that the practical application of this approach demonstrates that the contracting parties intended that the goods *first* be installed and *then* inspected. On this approach clause 10 becomes operative only once inspection had taken place. Mr Nepgen, correctly took issue with this submission, since it conflicts with the prescript that an exception must be determined on the pleading as it stands; that no reference can be made to any other document, nor can facts stated outside those mentioned in the pleading be brought into issue. In the latter regard the plaintiff was duty bound under the provisions of rule 18(4) of the Uniform Rules of Court to clearly and concisely set out the material facts which underlie the contention put forward by Mr White.

[13] Regard being had to the contradictory allegations in the particulars of claim, the crux of the exception, Mr Nepgen contended, is that the particulars of claim evidences no allegation/s to establish any basis upon which the deemed waiver in clause 10 of the "standard terms and conditions" does not apply to the plaintiff's claim.

[14] The argument is not without merit. The extracts of the particulars of claim as set out earlier in this judgment, can be read in any of a number of respects, namely:

⁸ The quotation is dated 08 January 2015 and forms part of Annexure POC 2 to the amended particulars of claim

- (i) That the first part of clause 10 requiring notice of defects does not apply, in that the defects relied upon were latent, alternatively, that the clause could not be complied with because the defects were latent; or,
- (ii) That having regard to the nature of the defects pleaded as latent, clause 15 should be interpreted to be applicable to patent defects only; or,
- (iii) That the provision of notice during January 2016 should be construed as compliance with clause 10; or
- (iv) That the deemed waiver constitutes a rebuttable presumption, which the plaintiff seeks to rebut for one or more of the reasons set out in the particulars of claim.

[15] This quantative analysis, undisputed by Mr White, patently indicates that the particulars claim are capable of a number of potentially different meanings. Where the plaintiff does not, on the pleading as it stands, identify exactly which meaning it relies on for its case, then the defendant may justifiably be heard to complain that it does not know what case it has to meet - this being occasioned by the extent of the embarrassment and prejudice caused by the inherent vagueness complained of.

[16] In the result the following order issues:

- (i) The defendant's exception as contained in paragraph 3 of its Notice of Exception dated 1 April 2019, is upheld.
- (ii) The plaintiff is granted leave to amend its particulars of claim to remedy the defect, if so advised, such amendment to be effected within thirty (30) days from date hereof.
- (iii) Failing the amendment of the particulars of claim as directed above the defendant is granted leave to bring an application to strike out the plaintiff's claim.
- (iv) The plaintiff is ordered to pay the costs of this application.

M. S. RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:

Adv. A. N. White
Instructed by Flemix & Associates
Inc.
Port Elizabeth

For the Excipient (Defendant):

Adv. J. J. Neppen
Instructed by Goldberg & De Villiers
Incorporated
Port Elizabeth