

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

CASE NO: 262/2019

Date heard: 22 August 2019

Date delivered: 25 February 2020

In the matter between:

**ATC SOUTH AFRICA WIRELESS
INFRASTRUCTURE (PTY) LTD I**

FIRST PLAINTIFF

**ATC SOUTH AFRICA WIRELESS
INFRASTRUCTURE (PTY) LTD II**

SECOND PLAINTIFF

and

SALEEM DESAI N.O.

FIRST DEFENDANT

SALIM EBRAHIM ALLY N.O.

SECOND DEFENDANT

JUDGMENT

JAJI J:

[1] This is an opposed application for an exception as amplified in the notice of exception dated 07 April 2019.

[2] The excipients except to plaintiff's particulars of claim on the basis that they fail to disclose a cause of action on the following grounds:

- (i) The lease was concluded between Eaton Towers South Africa (reg. no. 2009/010714/07) and excipients in their capacity as Trustees of the Saldo Trust (See para 10 of the Particulars of Claim);
- (ii) The said lease was concluded on 18 June 2015;
- (iii) Clause 14 of the lease prohibits other party from ceding, delegating, assigning or otherwise disposing any of its rights in terms of the agreement without the consent of the other party;
- (iv) The plaintiffs contend in the particulars of claim (para 4) that ATC South Africa (ATC1) acquired the lease agreement from Eaton Towers with effect from November 2016; (Eaton Towers changed name to ATC (II) on 22 September 2016);
- (v) The excipients contend that the effect of the assignment (ATC I acquiring lease agreement from Eaton Towers) is that Eaton Towers is no longer the lessee with effect from November 2016 and the first plaintiff (ATC I) became the lessee with effect from November 2016. (The defendants averred that the plaintiffs failed to allege as they are required to, that the above assignment was given effect to with prior consent of excipients as required by Clause 14 of the lease agreement.)

- (vi) Accordingly, excipients contended that in the circumstances *ex facie*, the particulars of claim read with the lease agreement, plaintiffs have not complied with their obligations in terms of the lease agreement as stated in paragraph 12 of the particulars of claim. Submitted accordingly that the plaintiff's particulars of claim fail to disclose a cause of action.

[3] **EXCIPIENTS' HEADS OF ARGUMENT**

- (i) The excipients essentially pleaded "*exceptio non adimpleti contractus*." The second plaintiff (ATC II), formerly Eaton Towers, the original lessee. The first plaintiff acquired Eaton Towers with effect from November 2016;
- (ii) The above, submitted the excipients, amounted to an assignment (ie cession of rights and delegation of obligations). The two plaintiffs have been joined despite the above assignment;
- (iii) Eaton Towers no longer has any *locus standi* (by virtue of the assignment). ATC II has no *locus standi* and may not enforce the contract because the requisite mandatory written consent prior assignment was not sought and obtained;
- (iv) Appearing from the particulars of claim, plaintiffs have not complied with obligations in terms of the agreement. They have repudiated its terms and therefore not entitled to enforce the agreement in the manner pleaded without an amendment which either eliminates the assignment or produces the prior written consent;

- (v) Absent such an amendment, each of plaintiffs' claims are mutually destructive of each other eliminating a valid cause of action.

[4] **EXCEPTION**

- (i) Clause 14 frowns on assignment without prior written consent of the other (excipients herein). On plaintiffs' own case, the lease expressly provides for prior written consent before assignment is effected;
- (ii) Herein, plaintiffs were required to allege and prove either prior written consent or that assignment fell within the exceptions not requiring prior written consent (Clause 14). There can be no assignment without obtaining prior written consent and as such in either event Eaton Towers enjoys no *locus standi*;
- (iii) The plaintiffs' case as pleaded, Eaton Towers divested its rights (consequential to the assignment). This is done without prior consent which amounted to repudiation of the lease by Eaton Towers. The court was referred to a matter of ***Universal Storage Systems (Pty) Ltd v Crafford and others*** 2001 (4) SA 249 (W), quoting from ***U-drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd*** 1976 (1) SA 137 (D) at 149G-H. Herein the court upheld *exceptio* defence and dismissed the appeal accordingly. Milne J stated:

“Clearly if the applicant evinced an intention no longer to be bound by the contract . . . , in my view, the respondents would be entitled to treat the contract as at an end, and the appellant would not be entitled to enforce the restraint.”

- (iv) The court was further referred to Christie's Law of Contract in SA, 7th edition, it was submitted that "a plaintiff against whom the *exceptio* is successfully raised and whose time for performance has not run out, may rectify matters by performing or tendering to perform and then again claiming performance or whatever relief it desires against the defendant." The court was also referred to a matter of ***BK Tooling (Edms) Bpk v Scope Engineering Precision (Edms) Bpk*** 1979 (1) SA 391 (A) at 418 – 419. It was held in ***BK Tooling*** that "one party to a bilateral contract cannot call upon another party to perform on the contract without performing his/her part. . . Extent of plaintiff's failure to perform is immaterial. Plaintiff's duty is to perform . . . , no matter how slight that failure maybe, entitles the defendant to raise the *exceptio* . . ."
- (v) The excipients argued that plaintiffs' failure herein related to an assignment without consent which was material to the contract. There is a basic idea of contract that people must be bound by the contracts they make. The plaintiffs' performance or tender is part of its cause of action, it must therefore plead it specifically and failure to do so will make its declaration excipiable when the excipients raise an exception, the onus is on the plaintiffs to prove that it has performed, or has been prevented by the defendant to perform;
- (vi) Importantly, the court was referred to the matter of ***ESE Financial Services (PTY) Ltd v Cramer*** 1973 (2) SA 805 (C), in the context of

an exception, the court stated that “where a plaintiff sues to enforce performance of an obligation which is conditional upon performance by himself of a reciprocal obligation owed to the defendant, then the performance by him of this obligation is a necessary pre-requisite of his right to sue and should be pleaded by him. Conversely the defendant may raise a defence of *exceptio non-adimpleti contractus*.”

- (vii) In ***Van Achterberg v Walters*** 1950 (3) SA 734 (T) at 745, it was held that “the creditor has to agree to the new debtor in place of the old . . . , but there can be no novation or delegation [of which the assignment of rights and liabilities under the lease is an example] without agreement between the creditor and the assignee.”
- (viii) The excipients concluded in the relief they sought that if there was no prior written consent, plaintiffs’ case was stillborn and should not proceed to trial and the exception would bring finality. They contended that plaintiffs should be ordered to make an amendment. Both ATC and Eaton Towers can never be lessees. They must choose whether they rely on the assignment or whether they abandon such assignment and rely on lease with Eaton Towers. Both plaintiffs seek access. Either Eaton Towers is the lessee if there was no assignment, or conversely, if there was a valid assignment, then ATC is the party. But in the latter case, the necessary prior written consent must be sought and obtained and an allegation to that effect must be made.

- (ix) Accordingly, excipients submitted that the exception should be upheld with costs. Plaintiffs be afforded a period of twenty (20) days to file an amendment.

[5] **PLAINTIFFS' / RESPONDENTS' HEADS OF ARGUMENT**

- (i) Briefly, the plaintiffs raised points *in limine* viz:- the issue of a notice of bar which was served to the excipients and requested them to file a plea. Excipients did not file any plea and were also barred from filing the notice of exception;
- (ii) The second point in limine is that the exception is limited to the grounds raised in the notice of exception. Plaintiffs argued that the excipients introduced further grounds of exception which was not permissible. Plaintiffs in amplification argued that an exception should be clearly and concisely stated. It further contended that a party is bound by the terms in which it is framed and by the issues which it raised.
- (iii) Plaintiffs submitted that the excipients have not discharged the onus of showing that the pleading is excipiable. It further submitted that it is not plaintiffs' pleaded case that Eaton Towers ceded, delegated, assigned or otherwise disputed its rights / or obligation as envisaged in Clause 14. The court was referred to the matter of ***Sun Packaging (Pty) Ltd v Vreulink*** 1996 (4) SA 176 (A) where it was held that "an exception has a duty to persuade the court that upon every interpretation which the

pleading in question and in particular the document on which it is based, can reasonably bear no cause of action is disclosed, failing this, the exception ought not be upheld.

[6] **EXCEPIENTS' REPLY TO POINTS IN LIMINE**

- (i) Plaintiffs themselves took further steps in setting the exception down and accordingly cannot rely on the notice of bar;
- (ii) Plaintiffs filed heads of argument and opposed the exception on merits seeking dismissal with costs. Plaintiffs cannot turn around after all these steps and say it wants to rely on an irregular step;
- (iii) A party is not simply entitled to treat the irregular proceeding as a nullity. Rule 30(1) must be followed if a party wants to rely on an irregularity;
- (iv) The court was referred to a matter of ***Trans-African Insurance Co Ltd v Maluleka*** 1956 (2) SA 273 (A) at 278F-G where it was stated that "Technical objection to less than perfect procedural steps should not be permitted in the absence of prejudice, to interfere with expeditious and possible inexpensive decision of cases on their real merits."

[7] **APPLICABLE LEGAL PRINCIPLES**

- (i) It is so that if the matter proceeded to trial as it is, lot of unnecessary evidence would have to be led. The excipients correctly pointed out that in any event, s 171 of the Constitution allows the court to regulate its own proceedings. Dismissing an exception on technicalities would not be in line with the constitution;

- (ii) The contention that the excipient introduced further grounds is merely a technicality. The notice of exception, paragraphs 1 – 8, clearly laid the basis of the exception. In any event, it is trite that a party cannot plea its case on heads of argument. The contention that the excipient should have lifted the bar is overtaken by events. Indeed, the plaintiffs took further steps by setting down the exception and filed heads opposing the exception on merits;
- (iii) The crux of the plaintiffs' pleaded case is that Eaton Towers as a result of the assignment divested its rights. This was done without prior written consent. The pleadings are clear in this regard and the plaintiffs cannot argue otherwise. The excipients upon any interpretation which the pleading in question, contend that they can reasonably bear no cause of action. The excipient indeed has a duty to persuade the court in this regard;
- (iv) The excipients have correctly argued that the plaintiffs do not deal with issues raised i.e. plaintiffs' failure to allege compliance with its obligations in the agreement relied upon. "*Exceptio non adimpleti contractus*." The excipients simply showed the logical consequences and implications of the plaintiffs' failure. The court clearly would take into account interests of justice when using its inherent power to regulate its own proceedings;
- (v) The authorities and submissions by the excipient are on point and the court is obliged to consider them carefully when they have such

persuasive effect. In **Bentel Associates in re:- Bradford v Bentel Associates** 2013 JDR 0623 (GSJ) para [76] , the court stated:

“I have read the authorities tendered by both sides for or against the grant of exception. It is my considered view that the excipient’s authorities were more suited and apt for their case. Plaintiff’s authorities may have been relevant in other situations, however, not appropriate in this matter.”

This is precisely what has happened in the matter at hand.

- (vi) A cession should not occur unless consented to in writing. It is the same with the assignment. Importantly, exception founded upon the contention that summons disclose no cause of action is designed to obtain a decision on a point of law which will dispose of the case in whole or in part avoiding leading of unnecessary evidence at trial;
- (vii) In ***Ocean Echo Properties 327 CC v Old Mutual Life Assurance Company SA Ltd***, 2018 ZASCA 09, it was held that:

“Leave to amend is not a matter of an indulgence, it is a matter of course unless there is good reason that the pleading cannot be amended. No good reason was evident or attested in this case.”

It is so with the matter at hand save for technicalities. Froneman J at para (31) held that:

“The outcome either way of the exception will have no final effect on the issues between the parties. Even if the exception is

upheld, the respondent will have the opportunity to amend its particulars of claim.” (See ***Mlamli Baliso v Firstrand Bank Ltd t/a Wesbank*** (2016) ZACC 23). Importantly, “where an exception is taken, a court looks only to the pleading excepted as it stands not to facts outside these stated in it.” (Para 33) (Supra)

- (viii) At para 44.3 (the Constitutional Court in ***JP Hendrick Pretorius v Transport Pension Fund and others***, case no CCT 95/17 CC, the court stated that “the object of an exception is to dispose of a case or a portion of it in an expeditious manner by weeding out cases without legal merit, regardless of the complexity of the legal question.”
- (ix) At page 70, “the main purpose of an exception that no cause of action has been disclosed is to avoid the leading of unnecessary evidence at trial.” This is precisely what the excipients have submitted.
- (x) In the matter of ***Rahim Khan N.O v Maxprop Holdings (Pty) Ltd and another*** (084/2018) ZASCA 171 (30 November 2018), at para 51, the court stated that “the principles governing the formulation of a cause of action are trite. The plaintiff must only plead a complete cause of action which identifies the issues upon 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. Herein, the plaintiff has failed to plead and formulate a cause of action at least as the pleadings stand.
- (xi) At para 21 above, it is stated that “The law governing exceptions s and the consequential relief, if upheld is clear. 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/her cause of action may be based, the claim is (not may be) bad in law.” (See ***Vermeulen v Goose Valley Investments (Pty) Ltd*** 2001 (3) SA 986 (SCA) para 7. The excipient has shown without a response from the plaintiff on merits that the claim is bad in law in the manner pleaded.

CONCLUSION

[8] The excipients herein have successfully persuaded me that upon every interpretation of the pleading it can reasonably bear, particularly the document upon which it is based (lease agreement), it does not disclose a cause of action. There is no response on merits from the plaintiffs. The particulars of claim as currently pleaded do not disclose a cause of action. Accordingly, the exception is upheld.

[9] I, therefore make the following order:-

- (i) Exception is upheld with costs including costs of two counsel;
- (ii) Plaintiff is ordered to file an amendment to its particulars of claim within a period of twenty (20) days of this order.

N P JAJI

JUDGE OF THE HIGH COURT

APPEARANCES

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