

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

Case No.: 1400/2020

Date heard: 25 March 2021

Date delivered: 20 April 2021

In the matter between:

GAVIN JONES-AFFAT

Plaintiff

and

ABSA INSURANCE AND FINANCIAL ADVISORS (PTY) LTD

Defendant

(Excipient)

JUDGMENT

ZIETSMAN AJ:

- [1] This is an exception relating to the interpretation of an Employment Contract entered into between the parties. I shall refer to the parties herein as in the action.
- [2] In his particulars of claim the Plaintiff alleges that he was previously employed as a financial advisor by the Defendant. It was during or about March 2011 that they entered into an Employment Contract. They also entered into a Ring-Fencing Agreement during December 2016. The Plaintiff further alleges that the Defendant breached the terms of both the Employment Contract and the Ring-Fencing Agreement, and that, as a result thereof, the Plaintiff elected to cancel the Employment Contract and accept the Defendant's repudiation of the Ring-Fencing Agreement, and also terminated the said agreement. The Plaintiff pleads that, as a

result, he suffered damages in the amount of R6 000 000.00 for past and future loss of income.

- [3] The Defendant gave notice of exception on the basis that the particulars of claim lack averments to sustain a cause of action, alternatively are vague and embarrassing. The Plaintiff did not amend his particulars of claim and the Defendant filed a notice of exception. At the hearing of the matter Mr Gajjar, who appeared on behalf of the Defendant, submitted that the Defendant only persists with one of the three grounds of its exception, being:

“That the policy which Plaintiff relies upon pursuant to clause 28 of his contract of employment was not part of his terms and conditions of employment. It was not specifically incorporated and therefore could not be breached as it was not a term and condition of employment.”

- [4] The test on exception has been restated in *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA) as follows:¹

“In deciding an exception a court must take the facts alleged in the pleading as being correct. It is for the excipient to satisfy the court that the conclusion of law set out in the particulars of claim is unsustainable. The court may uphold the exception only if it is satisfied that the cause of action or conclusion of law cannot be sustained on every interpretation that can be put on those facts.”

- [5] An exception on the ground that it is vague and embarrassing involves a two-fold consideration.² The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to serious prejudice.³

¹ At par [22].

² *Steve's Wrought Iron Works and Others v Nelson Mandela Metropolitan Municipality* 2020 (3) SA 535 (ECP) at par [24]; see also *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211; Cilliers *et al* Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa (5th Edition, 2009) volume 1 at p 634; and the general principles as restated in *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 899 – 903.

³ *Freedom Property Fund Limited and Another v Stavridis and Others* [2018] 3 All SA 550 (ECG) at par [22].

- [6] I now turn to deal with the exception. The Plaintiff pleads the material terms of the Employment Contract. For purposes of the exception it is necessary to quote clause 28, which reads as follows:

“Your employment with Absa shall also be covered by the policies and procedures published by Absa from time to time and you must familiarise yourself with these policies and procedures. In particular you must read and comply with the Absa Communications Policy and by signing this Agreement you consent to Absa intercepting any communication sent by you or sent to you on Absa office systems (including but not limited to telephone, internet, intranet, e-mail).”

- [7] The Plaintiff pleads further, that in terms of clause 28 of the said agreement:

“...the Defendant’s policy on replacement of policies and honouring of existing relationships with fellow colleagues employed by the Defendant was incorporated into the Employment Contract and binding upon the parties thereto”. (Paragraph 6 of the Plaintiff’s particulars of claim).

- [8] The Plaintiff submitted that clause 28 must be read in conjunction with clause 31.1 of the Employment Contract, which reads as follows:

“This Agreement, including any attached schedules, together with any documents referred to in it, sets out the whole agreement between the parties relating to and cancels all previous agreements, representations and arrangements in connection with your employment with Absa. No variation of this Agreement is valid unless in writing.”

- [9] The Defendant submitted that if one has regard to paragraph 6 of the Plaintiff’s particulars of claim, clause 28 of the Employment Contract deals with the relationship between the Plaintiff and fellow colleagues employed by the Defendant, and that that is the root of the Defendant’s complaint. Whilst that may be so, it differs from the Defendant’s ground of exception as set out above. It is trite that a party is bound by the terms in which the exception is framed and by the issues which it

raises.⁴ The Defendant is bound by the ground of its exception and I can therefore not have regard to this complaint.

[10] The Defendant's alternative argument was that, given the nature of the complaint, it would be appropriate to defer consideration of the exception to the trial and that the question of costs be reserved for determination by the trial court. In support of this alternative argument, the Defendant submitted that the Plaintiff also contends that the complaint involves a matter of interpretation. The Defendant referred to *Hudson v Hudson* 1927 AD 259 at 269 and *Versluis v Greenblatt* 1973 (2) SA 271 (NC) at 278A-C in support of its contention that the court has the power to defer consideration of the exception to the trial.

[11] In *Hudson*⁵ the plaintiff excepted to a plea filed by the first defendant, the exception was dismissed and the plaintiff filed its replication, the defendant a rejoinder and the case was set down for trial. Thereafter the trustee of the plaintiff's insolvent estate obtained leave to intervene as co-defendant and to file pleadings. Four days before the trial a plea was filed in substantially the same terms as the first defendant's plea. Two days before the trial the plaintiff's attorney applied for a postponement claiming the days allowed for excepting or replying to the plea had not yet lapsed. The postponement was refused and on the same day the plaintiff's attorney filed the exception, virtually on the same grounds as the exception against the first defendant's plea. The trial court held that the exception was an abuse of the process in that it was an attempt to defeat the judgment refusing a postponement of the trial. Further, that the exception was taken *mala fide* in order to gain time. Accordingly, the trial court refused the postponement, struck out the exception and ordered that the action should proceed, and upon the plaintiff failing to appear, granted absolution from the instance. On appeal, the court held that since every court has the power to defer consideration of an exception to trial, the exception had rightly been struck out. The facts of this matter are clearly distinguishable from the facts in *Hudson*.

[12] In *Versluis* an exception was taken by the plaintiff that the plea disclosed no defence. The court held that where both parties agreed that the underlying trust between

⁴ See *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (W) at 898F – 899B.

⁵ An appeal to then Appellate Division.

partners was lacking, it appeared that the trial court, in the event of the parties being unable to reach agreement, would in any event have to decide about the rights of the respective parties and assess their conduct. Therefore, the trial court would be in a much better position, after hearing the evidence, to give a fair judgment in the matter. The court held that the whole matter was interwoven with the evidence which would be led at the trial and ordered that the exception should stand over and be postponed to the trial. In reaching this conclusion, the court referred to the order that was granted in the matter of *Minerals & Quarries (Pty) Ltd v Henckert en 'n Ander* 1967 (4) SA 77 (SWA) at 84. In *Minerals & Quarries* the court referred to, *inter alia*, *Hudson* and also *Herbstein and Van Winsen* (1966).

[13] In *Herbstein and Van Winsen*⁶ the authors state that:

“The rules do not curb the power of the court on grounds of convenience to order an exception to stand over for decision at the trial when, for instance, it raises a point of law that may not arise at the trial and may thus prove academic, or when a proper decision on the exception is bound up with the merits of the dispute.”

[14] The complaint in this matter does not raise a point of law which may not arise at the trial and may thus prove academic. With regard to the second instance, when a proper decision on the exception is bound up with the merits of the dispute, the exception cannot be decided on the pleadings as it stand, and, in my view, ought to be dismissed.

[15] The main purpose of an exception is to avoid the leading of unnecessary evidence.⁷ By the nature of exception proceedings the correctness of the facts averred in the plea must be assumed.⁸

[16] The Plaintiff submitted that his cause of action is not only based on breach of his Employment Contract, but also on breach of the Ring-Fencing Agreement, and that exceptions are not the appropriate procedure for dealing with issues of interpretation

⁶ *Herbstein and Van Winsen supra* at volume 1 p 645 (footnotes omitted).

⁷ *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Ltd* 2018 (3) SA 405 (SCA) at par [9] (footnotes omitted).

⁸ *Ocean Echo Properties supra* also at par [9].

of contracts. Further, that the words ‘together with any documents referred to in it’ in clause 31.1 of the Employment Contract, with the emphasis on ‘in it’, must be interpreted to include the Policy which the Plaintiff refers to in paragraph 6 of his particulars of claim.

[17] “It is true that, generally speaking, the Court is reluctant to decide upon exception questions concerning the interpretation of a contract where the whole contract is not before the Court or where it appears from the contract itself or from the pleadings that there may be admissible evidence which, if placed before the Court, could influence the Court’s decision as to the meaning of the contract”. (See *Dettman v Goldfain* 1975 (3) SA 385 (A) at 400.)

[18] In *Picbel Groep Voorsorgfondds (in Liquidation) v Somerville, and Related Matters* 2013 (5) SA 496 (SCA) the court held that:⁹

“In *Lewis v Oneanate (Pty) Ltd and Another* Nicholas AJA stated that an excipient bears the burden of persuading the court that ‘upon every interpretation which the particulars of claim’ and any agreement on which they rely ‘can reasonably bear, no cause of action is disclosed’. And, in *Sun Packaging (Pty) Ltd v Vreulink*, Nestadt JA confirmed that there is no hard and fast rule that the interpretation of agreements is to be avoided on exception. He said:

‘As a rule, Courts are reluctant to decide upon exception questions concerning the interpretation of a contract. But this is where its meaning is uncertain. . . . *In casu*, the position is different. Difficulty in interpreting a document does not necessarily imply that it is ambiguous. . . . Contracts are not rendered uncertain because parties disagree as to their meaning.’”

[19] In my view it does not appear as if the meaning of clause 28 is uncertain, but that the question will rather be to what extent the provisions contained in the Policy referred to by the Plaintiff in his particulars of claim will be applicable to the relationship between the parties. The very fact that the Defendant submits that the complaint involves a matter of interpretation leads me to the conclusion that the exception cannot be decided on the facts averred in the particulars of claim, which must be assumed.

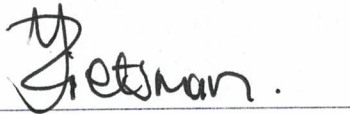
⁹ At par [26] (footnotes omitted).

[20] Accordingly, in my view it would not be appropriate to grant an order that the exception be deferred to the trial. I say so because if the exception cannot be decided on the pleadings as it stand since it requires evidence to be presented, the exception ought to be dismissed.

[21] The Defendant neither satisfied this court that on all possible readings of the facts that no cause of action is made out, nor that the particulars of claim are vague and embarrassing to such an extent that the Defendant is prejudiced.

[22] In the result:

The exception is dismissed with costs.



T. Zietsman

ACTING JUDGE OF THE HIGH COURT

Appearances:

Obo Plaintiff: Adv. A.C. Moorhouse, instructed by TN and Associates, Port Elizabeth

Obo Defendant

(Excipient): Adv. G.J. Gajjar, instructed by Cliffe Dekker Hofmeyer Incorporated
c/o Rushmere Noach Incorporated, Port Elizabeth