

REPUBLIC OF SOUTH AFRICA



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

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

22 January 2024

DATE

SIGNATURE

CASE NO: 44431/2019

In the matter between:

ASSORE LTD

AFRICAN MINING AND TRUST COMPANY

CHARLES EDWARD WALTERS

BONGANI PHAKATI

and

MEGAN DOMINIQUE PARIS

First Excipient

Second Excipient

Third Excipient

Fourth Excipient

Respondent

In re:

MEGAN DOMINIQUE PARIS

ASSORE LTD

AFRICAN MINING AND TRUST COMPANY

Plaintiff

First Defendant

Second Defendant

CHARLES EDWARD WALTERS

Third Defendant

BONGANI PHAKATI

Fourth Defendant

Coram: Holland-Muter J

Date of Hearing: 31 October 2023 – Courtroom 9B

Handed down on: 22 January 2024

(The matter was heard in open court judgment was handed down electronically by uploading the judgment onto the electronic file on CaseLines and circulating to the parties' representatives by E-mail. The date of judgment is deemed to be the date of uploading onto CaseLines)

JUDGMENT

HOLLAND-MUTER J

- [1] The excipients (defendants in the main action) objected to the respondents against them, the respondents adamant that the particulars of claim remained excipiable after amended, either as being vague and embarrassing and/or failing to disclose a cause of action.
- [2] I will refer to the parties as they are in the pending action to prevent any possible confusion. The excipients' notice of exception heading already addressed this issue and I will continue referring to the parties as cited in the pending action.
- [3] After hearing arguments on behalf of the parties, **F BEZUIDENHOUT AJ** granted the plaintiff leave to amend her particulars of claim on 21 February 2023. In arriving to the decision after hearing arguments regarding the proposed amendments to the particulars of claim, **F BEZUIDENHOUT AJ** in par [47] of the judgment held that ***"In my view the amended particulars of claim is therefore not excipiable"***.

- [4] The defendants proceeded to file a rather comprehensive notice of exception against the amended particulars of claim, the matter now before this court to decide upon. When comparing the previous grounds for exception as set out in the judgment *supra* (from para [26] to [29]), it is clear that the present grounds for exception are nothing more a detailed exposition of the previous grounds for exception previously ruled upon by the court.
- [5] Having the luxury of the written judgment by **F BEZUIDENHOUT AJ**, there is no need to repeat each claim and objection in detail. The crux of the exception remains the same.

LEGAL PRINCIPLES RELATING TO EXCEPTIONS

- [6] Rule 23 of the Uniform Rules of Court deals with exceptions. The essence of the Rule is that where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, the opposing party may deliver an exception thereto and the grounds upon which the exception is founded shall be clearly and concisely stated.
- [7] The object of an exception is to dispose of a case or a portion thereof in an expeditious manner, or to protect a party against embarrassment which is so serious as to merit the costs. An exception it is a useful mechanism for weeding out cases without legal merit. **Erasmus, Superior Court Practice Volume 2 D1-294.**
- [8] A dismissal of an exception, however, save an exception to the jurisdiction of the court, presented, and argued as nothing other as an exception, does not finally dispose of the issue and is not appealable. The point could be re-argued at the trial in the event of the exception being dismissed. **Erasmus supra D1-295-295.**
- [9] The onus as far as exceptions go, is on the excipient (the defendants present) to establish the objection. **Colonial Industries Ltd v Provincial Insurance Co Ltd 1920 CPD 627 at 629.**

- [10] Important is that if the particulars of claim are excipiable, an amendment for leave to amend ought to be dismissed unless the proposed amendment addresses all complaints. It is trite that amendments ought not to be allowed where its introduction into the pleadings would render such pleading excipiable. **Cross v Ferreira 1950 (3) SA 443 C at 450 E-F.**

- [11] It is clear from the judgment of **F BEZUIDENHOUT AJ**, in particular para [40] & [47] that the proposed amendment was not excipiable. This is not a court of second standing to re-assess the judgment *supra* and to re-visit the issue whether the amended particulars of claim was excipiable. It remains possible for the defendants to investigate this at trial stage and to scrutinise and test the plaintiff's case. The defendants are however not allowed to have the proverbial second bite of the cherry at this stage. The exception ought to be dismissed.

COSTS

- [12] The purpose of an award of cots to a successful litigant is to indemnify the party for the expense to which the party has been put through to initiate or defend unjustly litigation. A cost order is not intended to be compensation for a risk to which a party has been exposed, but to refund expense incurred unnecessary. See **Herstein & Van Winsen, The Civil Practice of the High Courts of South Africa, 5th ed. Vol 2 p 951 and on.**
- [13] Awarding costs is a matter wholly within the discretion of the court. When exercising the judicial discretion, the court will consider all relevant aspects applicable to the specific matter before the court. This will include the kind of litigation, the success of a party, the need for the litigation, inflated claims if applicable, severability of issues, counterclaims if raised etc. The list is not exhaustive but each matter will be determined on the relevant aspects.
- [14] The general rule is that costs normally follow the successful party and the successful party is normally the party in whose favour judgment was given.

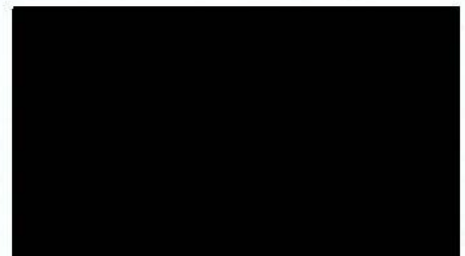
[15] A successful party may be deprived of costs in general terms depending on the conduct of the party and the necessity of the litigation. Likewise, the court may visit a party with a punitive cost order to indicate the court's disapproval of the conduct of a party, and this may result on a punitive scale regarding the awarded costs.

[16] I have considered all applicable factors in this matter and the reasonable conclusion is that the exception was brought unnecessary. The issue of whether the amended particulars of claim were excepiable was already dealt with by **F BEZUIDENHOUT AJ** in the previous judgment. I have referred to the relevant passages supra. See para [3] & [11] supra.

[17] I am of the view that the exception cannot succeed and that it should be refused. The following order is made:

ORDER

1. The exception is refused.
2. The defendants (excipients) are ordered to pay the costs of the plaintiff (respondent) on an attorney and client scale.



HOLLAND-MUTER J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

APPEARANCE.

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