



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: 22 February 2024 **Signature:** 

CASE No. 23453/2022

In the matter between:

WASTE PARTNER INVESTMENTS (PTY) LTD

Plaintiff/Respondent

and

FAW VEHICLE MANUFACTURING SA (PTY) LTD

Defendant/ Excipient

JUDGMENT

MAHOMED AJ

INTRODUCTION

The defendant in the action raised five grounds of exception to the plaintiff's particulars of claim, dated 29 June 2022. The exception is taken on the basis that

the particulars of claim lacks the necessary averments to sustain a cause of action, as the agreement the plaintiff relies on does not support its claim for the transfer and delivery of specific trucks. Counsel proffered there was no need to file any notice to cure the cause of complaint.

1. The plaintiff's claim is based on a settlement agreement made in full and final settlement, and which was made an order of court, annexed as W1. Mr Mudau appeared for the plaintiff and submitted that the agreement between the parties was for the purchase of specific trucks to service the plaintiff's waste disposal business. The plaintiff had previously used those trucks, which were leased to one Banakoma, the plaintiff's former client, and the plaintiff adapted the trucks for its waste disposal business. When Banakoma defaulted on a "master rental agreement" which it concluded with the defendant, the plaintiff negotiated to pay off that debt and "to purchase the four trucks it had adapted" , from the defendant. The agreement between the parties was for the purchase and sale of specific trucks. Mr Mudau submitted that the purchase price is paid, whether by direct payments to the defendant or the amount it realised in execution. It was contended that the defendant still retains an amount it recovered above the actual sale price and to date no trucks have been delivered.
2. Mr Mudau proffered that the plaintiff was never a party to the master rental agreement which is annexed to the pleadings. The particulars plead tacit terms and the defendant knows that the agreement that the plaintiff relies

on is for the purchase of specific trucks and for their delivery and transfer. Counsel denied any confusion, about the plaintiff's claims, the agreement that the plaintiff relies on *arises* from the "master rental agreement."

3. It was contended that the defendant is simply opportunistic, when it seeks to impute the master rental agreement to the plaintiff, to avoid filing a plea after it was placed on bar, this exception was served on the last day that the plea was due.
4. Advocate C van der Merwe appeared for the defendant (the excipient) and submitted that the particulars set out three separate and distinct claims based on the rental agreement, as annexed to the particulars, and that agreement does not provide for "delivery and transfer of specified vehicles" the agreement refers only to commercial vehicles. Furthermore, the agreement does not refer to delivery and transfer of ownership. It was contended that ownership will always remain with the defendant. Counsel submitted that the pleadings do not disclose a cause of action, the plaintiff will not be able to lead admissible evidence on its pleaded case as it relies on a written agreement. No evidence can be led that supplements the written agreement. therefore, the exceptions must be upheld.

THE LAW

5. The fundamental principle in exceptions/pleading is that the averment made must be concise and clear to enable the opposing party to meaningfully respond to the claim or plea, and to avoid prejudice.
6. An exception implies that the pleading objected to, “taken as it stands” is unable to fulfil its legal function, and the opposing party is unable to respond to it.
7. In **Cilliers v van Biljon**¹ the court held that even if the defendant knows what case he must meet, this does not disentitle him to except successfully where the plaintiff has failed to convey his case with “reasonable distinctness.” In *Boys v Piderit*,² the court stated that the pleading is also for the benefit of the trial court hearing the matter.”
8. An excipient must show that the pleading is excipiable on every possible interpretation that can be reasonably attached to it.

² 1925 EDL 23 at 25

GROUND OF EXCEPTION.

Ground 1

9. It was contended that the plaintiff failed to disclose a cause of action, it claims delivery and transfer of specific vehicles, however the settlement agreement does not refer to “specified vehicles,” but to “commercial vehicles.” Mr van der Merwe contended there may have been oral terms which may have been part of negotiations but that cannot assist the plaintiff in its legal basis for its claim. Counsel submitted that if the plaintiff cannot lead admissible evidence at trial in support of its version, there is no cause of action, and the exception must succeed. The court must consider the pleading as it stands, the agreement relied on does not provide for a delivery and transfer of specified vehicles. The agreement provides for commercial vehicles upon fulfilment of payment as per the master rental agreement which the plaintiff relies on.

Ground 2

10. The plaintiff claims for delivery and transfer of ownership of the vehicles, the settlement agreement does not provide for transfer of ownership of vehicles, in terms of the master rental agreement. Clause 2.5.1 of the agreement provides that the defendant would always be the owner, accordingly the plaintiff failed to disclose a cause of action on this claim.

Counsel contended that the agreement relied on was a lease, not a purchase and sale agreement.

Ground 3

11. The plaintiff claims the defendant was unduly enriched in the amount of R1 696 769.44, when it executed and recovered monies above the sale price. However, it is argued that the plaintiff failed to plead the elements of enrichment and therefor failed to plead the necessary facts to sustain a claim. The plaintiff failed to plead that the defendant was enriched, that the plaintiff was impoverished, and that the defendant's enrichment was at the plaintiff's expense, which was without cause, and therefor unjustified.

Ground 4

12. The plaintiff claims for damages in the alternative to enrichment, for payment of the sum of R6 017 484.21 with interest and costs. The plaintiff contends that it paid the amount and no vehicles have been delivered. It was argued that if the plaintiff failed in ground 2 on delivery and transfer, it cannot succeed in any claim for damages.

Ground 5

13. The plaintiff's claim for damages due to the defendant's breach, is not supported by material facts for either general or special damages, if fails

to plead that the damages flow naturally from the alleged breach and failed to plead a case for special damages. This claim for damages is not pleaded in the alternative.

14. Mr van der Merwe submitted that all grounds of exception be upheld and that the particulars of claim be set aside, the claim be dismissed with costs, which order is to be suspended, for 10 days pending the plaintiff's filing a notice to amend its particulars of claim.
15. Mr Mudau argued that the defendant could have requested for particulars regarding the vehicles but instead raised exceptions to delay the finalisation of the matter. It was contended that there is no confusion as to the vehicles the plaintiff requires to be delivered, the defendant knows of the specifics of the vehicles.

THE PARTICULARS OF CLAIM

16. Paragraph 8 of the particulars of claim provides,

“ the plaintiff entered into the settlement agreement for those specific commercial vehicles as opposed to buying new ones.”

17. Clause 2.1 of the settlement agreement, provides:

“Upon payment of the full R4 320 614.77. the applicant (the defendant in casu) agrees to deliver 4 commercial vehicles to the respondents which will be the fulfilment execution of the master

rental agreement and the return of 4 commercial vehicles.”³ No specific details are included in the agreement.

18. It is noteworthy that the particulars of claim refers to a “ master rental agreement,” but the plaintiff claims “delivery and transfer of the vehicles.”
19. At paragraph 5 of the letter of demand dated 7 February 2022, which is an annexure to the pleadings, the specifics of the vehicles are set out. This letter refers to a “master agreement with Banakoma.”⁴
20. Mr Mudau contended that the plaintiff concluded this agreement with the defendant, to “purchase specific trucks,” the parties have never concluded a master rental agreement, which permits the defendant to retain ownership.
21. The plaintiff was never a party to any master rental agreement, it pleaded in the alternative, for return of the purchase price, given that the trucks have not been delivered.
22. Furthermore, it was contended, that the plaintiff had to continue to operate its business and was forced to hire vehicles, as it awaits the delivery and

³ 001-20

⁴ 001-37

transfer of the trucks from the defendant. The costs of hire are the basis for the damages claim.

23. Mr Mudau proffered that the elements of enrichment can be found within the particulars and the fact that they do not appear in the conventional format, it cannot be fatal to the plaintiff's lawful claim. Mr Mudau contended that the defendant could have requested further particulars to seek clarification of the claim, the exception is an abuse of process, and the exceptions must be dismissed with costs. Counsel proffered that it is telling that the defendant was in no hurry through the litigation, the plaintiff had to place it on bar for its plea, and the plaintiff had to set down this exception, to move the matter along.
24. In reply Mr van der Merwe, argued that the court must consider the pleading as it appears, the plaintiff relies on a written agreement, which does not support its version. No tacit or implied terms can apply, the plaintiff cannot lead evidence that is contrary to the terms of agreement it relied on, as established in *Johnston v Leal*⁵. Counsel contended that the plaintiff has not laid a basis for delivery and transfer of ownership, it is not in the agreement they rely on. It was submitted that the exceptions are good in law and must be upheld with costs.

⁵ 1980 3 SA 927 A at 947 H

JUDGMENT

25. The plaintiff is bound to the provisions of the written agreement it relies on. I agree with Mr van der Merwe, that the claims for “specified vehicles and for delivery and transfer” are not apparent from the agreement, accordingly the particulars do not disclose a cause of action. The main point being that the plaintiff cannot provide admissible evidence to prove its claims for delivery and transfer of specified vehicles, at trial and therefore its particulars of claim do not disclose a cause of action.
26. Having heard Mr Mudau’s submissions, it is apparent that the plaintiff’s claim is founded in a partly oral and partly written agreement annexed as W1. In *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*, Watermeyer JA, stated:

“This court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence to its contents, nor may the contents of such document be contradicted, altered, added to or varied, by parol evidence.”

See also *AFFIRMATIVE PORTFOLIOS CC v TRANSNET LTD t/a METRORAIL* ⁶, where the court reaffirmed that *“the execution of a document deprives all previous statements of their legal effect.”*

⁶ 2009 (1) SA 196 SCA

27. The pleadings are for both the defendant and the court to understand the claim.

“A court is to look at the pleadings as it stands and no facts outside those stated in the pleading can be brought into issue, except where there is an inconsistency, and no reference may be made to any other document.”⁷

28. The writer Erasmus states that the excipient must demonstrate to the court that upon every interpretation of the pleading, *particularly the document on which it based can bear*, no cause of action is disclosed.⁸
29. The agreement relied upon makes no reference to a transfer and delivery. The plaintiff cannot lead evidence on tacit and oral terms, to supplement the agreement they rely on.
30. The object of an exception is to dispose of a matter expeditiously on a point. I am of the view the two main exceptions must succeed.
31. Grounds 3 to 5 of the complaint are related to the first and second grounds, and accordingly are upheld.
32. I noted that in its letter of demand, as annexed to the particulars of claim, the plaintiff does set out the specifics of the vehicles, albeit that the letter

⁷ Erasmus, Superior Court Practice, 2nd ed D1-293.

⁸ Erasmus, op sit, D1-294

of demand is not specifically incorporated into the particulars. The plaintiff's difficulty, lies in that no oral evidence can be led on the terms of the agreement at trial.⁹

33. The plaintiff's claim must be reformulated, with greater precision.

Accordingly, I make the following order.

1. The plaintiff's particulars of claim is set aside.

2. The action is dismissed with costs, the order is suspended, pending the plaintiff's service of a notice of intention to amend its particulars of claim, within 10 days of this order.

3. The plaintiff is to pay the costs of the exception.

MAHOMED AJ

Acting Judge of the High Court

⁹ Leal v Johnson 1980 13 SA 927 A,

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 22 February 2024.

Date of Hearing: 3 November 2023

Date of Judgment: 22 February 2024

Appearances

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