

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

CASE NO: 58061/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED:

DATE: 28 March 2023

SIGNATURE

A handwritten signature in black ink, appearing to be "M. M. M.", is written over the word "SIGNATURE".

In the matter between:

ENGINEERING COUNCIL OF SOUTH AFRICA

Plaintiff

And

SIPHO ERNEST MADONSELA

Defendant

And

BOITUMELO COX MOKGORO

First Third Party

ENGINEERING COUNCIL OF SOUTH AFRICA

Second Third Party

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/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 28 March 2023.

MOTHA AJ

INTRODUCTION

1. Before this Court are two exceptions brought by the Plaintiff and the first and second third parties against the plea and the third party notice. The excipients submit that the plea lacks averments necessary to sustain a defence and third party notice lacks averments necessary to sustain a cause of action against the third parties. Five grounds of complaint are identified, as contemplated in terms of Rule 23 (1) as well as Rule 13 (6) of the Uniform Rules of this Court. Even though both the exceptions of the third parties and the Plaintiff will be dealt with at the same time, I need to point out their various grounds of complaint.

1.1 The five grounds of complaint raised by the third parties are:

First ground of exception:

- “The defendant has failed to make out any cause of action against the third parties for indemnification.”¹

Second ground of exception:

- “The defendant has failed to make out any cause of action against the third parties for contribution.”²

Third ground of exception:

- “The defendant’s pleading envisages that any order that is made for payment against the defendant in the plaintiff’s claim, or any portion thereof, will be transferred for payment to the third parties.”³

Fourth ground of exception:

- “The defendant appears to be relying on a claim against the third parties relating to settlement or compromise”⁴

Fifth ground of exception

- “The defendant appears to found his causa against the third parties on a claim that the defendant’s liability should be reduced and apportioned in accordance with the Apportionment of Damages Act.”⁵

¹ third parties notice of exception para 1

² supra para 9

³ Supra para 19

⁴ supra para 24

⁵ supra para 30

1.2 **The five grounds of complaint raised by the plaintiff are:**

First ground of exception:

- Similarly to the third parties, “The defendant appears to found his entire version to the plaintiff’s various claims and *causa*, on a defence that the defendant’s liability should be reduced and apportioned in accordance with the *Apportionment of Damages Act*.”⁶

Second ground of exception:

- Similarly to the third parties, “The defendant has predicated his Plea, or a substantial portion thereof, on the alleged actions of the first and second third parties.”⁷

Third ground of exception:

- “The defendant appears to have predicated his defence, or part thereof, on the special plea of *lis pendens* and/or prescription, although it remains unclear.”⁸

Fourth ground of exception:

- “The defendant has, in pleading to the Particulars of Claim, relied on a multiplicity of alternative defences.... The absence of the necessary material facts and *essentialia* particular to any of the

⁶ notice of exception para1

⁷ supra para 10

⁸ Suprapara20

alternative defences, and the absence of self-contained alternative defences, render the Plea excipiable.”⁹

Fifth ground of exception:

- “The defendant, in his various alternative defences, appears to be relying on a defence relating to settlement, or compromise.”¹⁰

THE FACTUAL BACKGROUND

2. On 7 December 2021, the Plaintiff instituted summons against the Defendant for the breach of a written employment contract, which was entered on or about 19 September 2014 and later renewed. The Plaintiff submitted that the Defendant, in his role as a chief executive officer and an employee of the Plaintiff, breached the terms of his employment contract. According to the Plaintiff, he acted contrary to the following “material, alternatively, express, further alternatively, implied terms of the contract”¹¹ namely that:

“5.5 Whilst in the employ of the plaintiff, the defendant shall be subject to the plaintiff’s policies and procedure, as amended from time to time

5.6 The defendant shall be required to conduct himself in a professional manner throughout his employment with the plaintiff and shall subscribe to standards of the utmost integrity.

5.7 The defendant owes a duty of good faith to the plaintiff in all circumstances.”¹²

⁹ Supra paras 27 and 31

¹⁰ Supra para 32

¹¹ particulars of claim para 5

¹² supra paras 5.5 to 5.7

3. The defendant, in particular, failed “and/or neglected to devote his whole time and attention to the affairs of the plaintiff;
Failed and/or neglected to abide by and act in accordance with the plaintiff’s policies and procedures, as amended from time to time;
Failed and/or neglected to conduct himself in a professional manner throughout his employment with the plaintiff;
Failed and/or neglected to subscribe to standards of the utmost integrity; and
Failed and/or neglected to act in good faith towards the plaintiff in all circumstances.”¹³
4. The action was defended. Following a notice of bar, on 22 April 2022 the Defendant delivered his plea and Third-Party notice. On 17 May 2022, the Plaintiff filed its notice of exception, and the Third-parties filed its notice of exception on 7 June 2022.

THE LAGAL FRAMEWORK

5. Uniform Rule 23 (1) reads as follows:
“(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and...”¹⁴

¹³ supra paras10.1to10.5

¹⁴ Erasmus Superior Court practice page D1 – 293

6. Uniform Rule 18 (4) is clear that every pleading must “contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading...”
7. Uniform Rule 13 (6) reads as follows:
“(6) The third party may plead or except in the third party notice as if you were a defendant to the action....”¹⁵
8. In the matter of *Vermeulen v Goose Valley Investments (PTY)Ltd*¹⁶ the court said:
*“It is trite law that an exception that cause of action is not disclosed by a pleading cannot succeed unless it can be shown that ex facie the allegations made by the plaintiff and any other document upon which his or her cause of action may be based, the claim is (not maybe) bad in law”*¹⁷
9. The Court in *Pretorius and Another v Transport Pension Fund*¹⁸ held:
“In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when that excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The

¹⁵ supra page D1 – 143

¹⁶ 2001 (3)SA 986 (SCA)

¹⁷ supra para 7 page 997

¹⁸ 2018 (2) SA 37 (CC)

purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.”¹⁹

ISSUES

10. Firstly , the grounds of complaint which straddle between the Plaintiff and the Third parties are Apportionment of Damages, contributory negligence, indemnification and compromise. I commence with the apportionment of damages. The Defendant in its plea stated the following:

“Further alternatively, in the event find that the defendant is found to have been negligent as aforesaid, which is denied, the defendant pleads that the defendant’s liability should be reduced and apportioned in accordance with the Apportionment of Damages Act, with the liability of the first and second third parties, joined as such in these proceedings.”²⁰

11. Both the Plaintiff and Third parties submitted the following:

“As clearly appears from the plaintiff’s *causa*, the plaintiff has instituted proceedings against the defendant on the basis of a material breach of his

¹⁹ supra para 15

²⁰ defendant's plea para 45

employment contract, from which breach the plaintiff's damages have arisen."

²¹

12. Addressing the issue of Apportionment of Damages Act, the Court in *Thoroughbred Breeders' Association of South Africa v Price Waterhouse*²² held that:

*"At that time the concepts of both contributory negligence and "last opportunity" were unknown to a claim based on breach of contract. That being so, it seems to me to follow that the Act was designed to address and correct a particular mischief that was identified as such within the law of delict; that it was confined to that particular mischief; and that the corresponding problem that might arise within the law of contract was never within the legislature's compass. The express wording used in the Act does not fit a contractual claim. In my view the comfort of Act was accordingly not available to PW in this case to counter or curtail TBA's claim for damages."*²³

13. During the proceedings, it soon became obvious that the Apportionment of Damages Act does not apply under these facts. Having taken instructions, Counsel for the Defendant informed the court that the Defendant was abandoning its opposition to this ground of complaint.
14. Secondly, the concession on the apportionment of damages has a knock-on effect on the defence of contribution. As already canvassed the issue of contributory negligence, as well as apportionment of liability, does not arise

²¹ notice of exception part 3

²² 2001 (4) all SA 161 (A)

²³ supra para 74 of South Africa

in a contractual claim. Fault in the form of negligence does not feature in deciding whether a party has breached the contract or not. Since this defence is not available in the law for the Defendant, the defence of contributory negligence is incompetent under these circumstances. Accordingly, the exception is upheld.

15. The next ground of complaint to be examined is the issue of indemnification, and this called into question the appropriateness of the third party procedure under these circumstances.
16. Rule 13 (1) (a) of the Uniform Rules of this Court sets out the basis on which a third party can be joined, namely contribution, indemnification and a declaratory. In its third party notice, the Defendant clearly states that it claims an indemnification from the third parties. It is trite that a right of indemnity only arises from contract, which contract may be express or implied, by statute or where it is implied by law. ²⁴ However, the Defendant does not show that it has a right against the third parties for an indemnity arising in contract, statute or by law. The Defendant has not pleaded in its third party notice a right in contract on which it basis its claim for an indemnity against the third parties. Even the relief that is prayed for does not mention indemnification. Therefore, the Defendant has not made out a case for indemnification at all.
17. The challenge that is faced by Defendant is that he predicated the joinder of the third party to these proceedings on a defence that is not available to him in law. It simply cannot be cured. It is fatally flawed. Therefore it stands to reason that the exception must prevail.

²⁴ Eimcon(SA)(Pty)Ltd v P Mattioda's Construction Co (SA) (PTY) Ltd 1967 (1)SA 236 (N) at 332H – 33A

18. The next ground of complaint is compromise. The Defendant pleaded as follows:

“Alternatively, the plaintiff’s claim arising out of the cause of action asserted in claim E has been extinguished, alternatively abandoned alternatively compromised by the plaintiff in the absence of the defendant.”²⁵

19. The head-note in *Gollach & Gomperts(1967) (Pty) Ltd v Universal Mills & Produce Co*²⁶ is instructive:

“A transaction is an agreement between two or more persons either to end litigation or to prevent litigation resulting from the differences between them. It is most closely equivalent to consent judgment.

Whether extra – judicial embodied in an order of Court, it has the effect of res judicata and, like any other contract and any order of court, made by consent, it may be set aside on the grounds that it was fraudulently obtained or on the grounds of Justus error, provided the error vitiated true consent and did not merely relate to motive or the merits of a dispute which it was the very purpose of the parties to compromise.”

20. The Court in *Georgias v Standard Bank Chartered Financed Zimbabwe Ltd*²⁷ regarded “compromise or transatio” as “...the settlement by agreement of disputed obligations or of a lawsuit the issue of which is uncertain. The parties

²⁵ supra para 58.1.

²⁶ 1978 (1)SA 914 (AD)

²⁷ 2000 (1) SA 126(ZS) at 1381-140D

agreed to regulate the intention in a particular way, each receding from his previous position and conceding something – I either diminishing his claim or increasing his liability.”

21. The Defendant cannot rely on compromise as a defence, because the compromise was between the Plaintiff and the third parties. The Defendant does not plead any conclusion of a contract between the Plaintiff and the Defendant or third parties. Put differently there is no *animus contrahendi* which is a *sine qua non* for the conclusion of a *transactio*.
22. Rule 18 (6) requires a party who relies on a contract to plead all essential elements of that contract and a written copy thereof to be annexed. The Defendant does not set out the terms of this compromise such as whether the Defendant and the Plaintiff were parties to the contract, where the contract was concluded, when the contract was concluded and finally the terms of the contract in which the Defendant seeks to rely. There are no material facts to sustain this defence, therefore, the complaint is well-founded and must succeed.
23. The next ground of complaint is the defence of *lis pendens*. The Defendant’s plea stated that “the disputes between the plaintiff and Mr Tsatsawane is *lis pendens*.”²⁸ However, the Defendant does not meet the requirements as set out in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and others*,²⁹ where the Court said:

²⁸ supra para 57.1.

²⁹ 2013 (4) All SA 509 (SCA)

“Voet said that there are three requirements for a successful reliance on a plea of lis pendens. There are that the litigation is between the same parties; that the cause of action is the same; and, that the same relief is sought in both. In Hassan and another v Berrange NO, – Zulman JA express these requirements in the following terms:

‘Fundamental to the plea of Lis alibi pendens is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause.’”³⁰

24. The Defendant does not set out the material facts necessary to justify the reliance on this defence. In his plea, the Defendant does not allege that there is a current pending litigation between the same parties, which litigation is predicated on the same cause of action between the same parties and in respect of the same subject matter. Dilatory defences and pleas in bar must be pleaded in a manner that includes all material facts and *essentialia*. This ground of exception is meritorious and, thus, must succeed.
25. The next ground of complaint is against the defence of prescription. The Defendant at paragraph 24 of his plea states the following: “the defendant was therefore aware, alternatively ought reasonably to have been aware, of its cause of action against the defendant, at the very latest in October 2017. These proceedings were instituted on 8 December 2021, more than three after the cause of action arose. Accordingly the plaintiff’s claim against the defendant has, *pro tanto*, prescribed.”

³⁰ Supra para 12

26. Dealing with the issue of prescription in the case of *Gericke v Sack*, the Court said:

*“ The onus was clearly on the respondent to establish this defence. He could not succeed if he could not prove both the date of the inception and the date of the completion of the period of prescription. ”*³¹

27. Counsel for the Plaintiff and third parties correctly submitted that the picture is not complete in that we do not know which date in October 2017 the Defendant is relying on. The defence of prescription rotates around dates and not months only. To simply mention a month in a year without a date is not in compliance with the case law. Furthermore, there is no prayer for prescription. Accordingly, this ground of complaint must be upheld.

28. Finally, Counsel for both the Plaintiff and third parties submitted that there was no *lis* between the Plaintiff and the Defendant. The Defendant cannot seek relief against third parties in answer to the Plaintiff’s contractual claim. This submission is against the authority in *MCC Contracts (Pty) (Ltd) v Coertzen*³² where the court held:

“However, in reaching it the Judge reasoned that because, on certain authority, there is no lis between a plaintiff and a third party “two ‘separate actions’ each with its own set of pleadings came into existence – one between the plaintiff and the defendant and one between the latter and the third party”. With that analysis, with respect, I do not

³¹ 1978 (1) (A) at 827H – 828 A

³² [1998]4 All SA 503 (A)

agree. The rule was designed to avoid a multiplicity of actions and to consolidate, in specified circumstances, a multiplicity of issues between a number of litigants, all in a single action. It reads accordingly. Whether or not a lis does arise between the plaintiff and a third party (and conceivably one could, if regard be had to sub-rules (7) and (8) and even if separation of issues occurs pursuant to sub-rule (9), the Rule provides for only one action and that action is necessarily the one began by the plaintiff. All this is plain from this first line of sub-rule (1) in which the “action” referred to cannot be any other action than that instituted by the plaintiff and the fact that the reference to “the action” or “action” in the latter sub-rules are clearly to the action referred to in sub-rule (1).”³³

29. Accordingly, this ground of complaint falls to be dismissed.
30. It is clear to me that the Defendant’s third party procedure is incompetent under these circumstances. Therefore, the third party notice was ill-conceived and falls to be dismissed in its entirety. The Defendant’s plea will have to be amended to remove the defences that are not available in law to the Defendant.

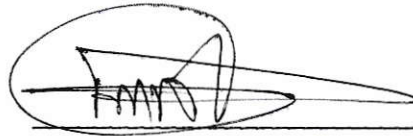
COSTS

31. It is trite that costs follow the action. There is no reason to depart from this well established principle of follow. In the result, I make the following order.

³³ supra para 8

ORDER

1. The Plaintiff's First, Third, Fourth and Fifth grounds of exception are upheld.
2. The Plaintiff's Second ground of exception is dismissed.
3. The Defendant is granted leave to amend his plea within 15 days of this order.
4. The Third parties' First to Fifth grounds of exception are upheld.
5. The Defendant's Third Party Notice and Annexure are dismissed.
6. The Defendant's claim against the Third Parties is dismissed.
7. The Defendant to pay costs of both the Plaintiff and the Third Parties.



MOTH A J

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

Date of hearing: 28 February 2023

Date of judgment: 28 March 2023

Appearances:

For the Plaintiff: Adv. M. Scheepers

And

The Third Parties:

(Instructed by: Malatji and Co. Attorneys)

For the Defendant: Adv. N. Mfeka

(Instructed by: Strauss Daly)