

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

Case Number: 25888/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 31/7/2023

E[...] L[...]

Plaintiff / Respondent

AND

VERSTER-ROOS INCORPORATED (PTY) LTD

Defendant / Excipient

JUDGMENT

H G A SNYMAN AJ

INTRODUCTION

- [1] This is an exception by the defendant / excipient ("*the excipient*") against the plaintiff's particulars of claim on the basis that it does not disclose a cause of action.
- [2] The excipient is the plaintiff's former attorney of record in her divorce action against her husband. It is common cause that the plaintiff is still married in community of property with her husband and that the divorce action has not been finalised.

- [3] The plaintiff issued summons against the excipient on 26 May 2021. She claims damages from the excipient in the amount of R1,317,515 plus interest and costs on the attorney and client scale.

THE PLAINTIFF'S PARTICULARS OF CLAIM

- [4] The plaintiff's claim is based thereon that she on or about 15 April 2018 entered a partially oral, partially written agreement with the excipient. In terms of this agreement, the plaintiff would render legal services to the plaintiff in respect of her divorce matter and the excipient would at all material times act in the best interest of the plaintiff.
- [5] The plaintiff alleges that the excipient failed and or neglected and or refused to attend to the plaintiff's matter in terms of the agreement and is in breach of the contract. The basis for this is that she allegedly informed the excipient that her husband would be retiring and drawing his pension fund "*soon*" and that she would be entitled to half of the capital amount of this pension as a result of the marriage in community of property. Moreover that she "*might*" forfeit same as soon as the benefit is paid out before the divorce was finalised. Plaintiff requested the excipient to "*act and inform the pension fund of the position*". The excipient allegedly breached the legal services agreement in that the excipient failed, refused and or neglected to inform the pension fund of the position. In the alternative, the excipient failed to bring the necessary application to have the pension fund frozen until such time that the divorce was finalised. As a result of the breach, the plaintiff allegedly suffered damages in that the pension fund moneys were paid out to her husband prior to finalisation of the divorce matter.
- [6] The plaintiff pleads that the pension fund paid out an amount of R754,010.92 to her husband, being one third of the capital amount. It is pleaded that although the capital amount cannot at this stage be calculated exactly, the reasonable inference to be drawn is that the

total capital amount at the time of the “*exit*” would have been three times the amount paid out. It is pleaded that fifty percent of that would be R1,317,515.00. This is the damage that the plaintiff allegedly suffered. In the plaintiff’s rule 23(1) notice, the excipient joined issue with the plaintiff’s calculations. Excipient stated that if one third payment is R754,010.92 and it is assumed that this is one third of the pension, the full amount of the pension would be R2,262,032.76. Half of this is R1,131,016.38, not R1,317,515.00. This issue was, however, not raised as part of the exception and is therefore not before this court.

THE LAW IN RELATION TO EXCEPTIONS AGAINST PLEADINGS ON THE BASIS THAT THEY DO NOT SUSTAIN A CAUSE OF ACTION

[7] The legal principles applicable to exceptions based on the grounds that a pleading fails to sustain a cause of action, is trite.

[8] In the matter of **Kahn v Stewart and others** it was held that:

“In my view, it is the duty of the Court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is any embarrassment, which is real and such as cannot be met by the asking of particulars, as the result of the faults in pleading to which exception is taken. And, unless the excipient can satisfy the Court that there is such a point of law or such real embarrassment, then the exception should be dismissed.”¹

[9] In **Jugwanth v Mobile Telephone Networks (Pty) Ltd**,² Gorvin JA held that:

“[3] The approach to an exception that a pleading does not disclose a cause of action was reiterated by Marais JA in

¹ 1942 (CPD) 386 and 391.

² 2021 JDR 2056 (SCA) at paragraph [3].

Vermeulen v Goose Valley Investments (Pty) Ltd:

'It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it is shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law.'

An exception sets out why the excipient says that the facts pleaded by a plaintiff are insufficient. Only if the facts pleaded by a plaintiff could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, can an exception succeed. Only those facts alleged in the particulars of claim and any other facts agreed to by the parties can be taken into account."

THE EXCIPIENT'S GROUNDS OF EXCEPTION

[10] The excipient raised two grounds of exception, both on the basis that the plaintiff's particulars of claim do not disclose a cause of action.

[11] The first of exception is that the plaintiff suffered no damages. This is based on section 7(7)(a) of the Divorce Act 70 of 1979 (*"the Divorce Act"*) which provides that:

"In determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets."

[12] The argument is that the value of the defendant's pension fund would therefore be included as an asset in the joint estate for purposes of determining the value of the estate on divorce. Based on the authority

of De Kock v Jacobsen and another 1999 (4) SA 346 (W) at 349G-H, it was argued that the accrued right to the pension forms part of the joint estate of spouses married in community of property. Under the circumstances, the accrued pension benefit is an asset in the joint estate, just as the pension interest was deemed to be an asset in the joint estate. There was therefore no loss to the plaintiff and accordingly no damages when a portion of the pension was paid out. The excipient argues that a cause of action founded on damages as a result of breach of contract can never be sustained (on any interpretation) without damages. It is in this regard common cause that there is no allegation in the particulars of claim that the pension benefit has been unlawfully alienated since it was paid out.

[13] The excipient also relies on sections 37D of the Pension Funds Act 24 of 1956 (*“the Pension Funds Act”*), which provides that a registered fund may deduct from a member’s pension interest any amount assigned from such benefit to a non-member spouse in terms of a decree of divorce granted under section 7(8)(a) of the Divorce Act. It was in this regard argued that entitlement of a spouse to payment of a portion of a member’s pension interest by a pension fund requires three things, namely: The existence of a pension interest; A determination by the divorce court that the non-member spouse is entitled to the assignment of a portion of the pension interest; and a decree of divorce.

[14] It was argued that none of these factors are present in this instance. The pension interest has been converted to a pension benefit, which has accrued to the joint estate as an asset therein. The excipient therefore concludes that the plaintiff has suffered no damages based on the interpretation of the particulars of claim and that the first ground of exception ought to be upheld.

[15] The second ground of exception is that the plaintiff’s cause of action is

premised on the fact that the excipient was negligent in executing of its obligations under the legal services agreement. The plaintiff alleges that the excipient breached the legal services agreement by neglecting to bring an application to have the pension fund frozen, pending finalisation of the divorce. The plaintiff argues in this regard that the existence of a marriage in community of property, in itself, does not entitle the plaintiff to a portion of her husband's pension fund interest, or to the "*freezing of the pension fund*". To do so would have amounted to interdictory relief as part of which any applicant had to plead and satisfy the requirements of an interim interdict, namely that the applicant has a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted, that the balance of convenience is in favour of granting of the interim relief, and that there is no other satisfactory remedy.

[16] The excipient excepts to the particulars of claim on the basis that the plaintiff does not plead any facts, which gave rise to a *prima facie* right for the freezing of the husband's pension fund, or any of the other requirements for interdictory relief. In addition, that on the plaintiff's version only a portion of the pension fund has been paid out and no basis is laid for the assertion that the pension benefit is payable to the full extent, entitling the plaintiff to half of the proceeds of the "*capital amount*".

[17] Under the circumstances it was submitted that on any interpretation of the particulars of claim, the plaintiff has not made out a case for breach of the legal services agreement, or for negligence.

ARGUMENTS ON BEHALF OF THE PLAINTIFF

[18] It was submitted on behalf of the plaintiff that the exception was instituted as an abuse of process to have the merits heard before the matter proceed to trial, in an attempt to discourage the plaintiff from pursuing the case due to the financial implications it may have. It was

done to try and force the plaintiff to drop the case on the basis that she cannot litigate on equal footing with the excipient who can afford to bring “*vexatious exceptions to the pleadings in hopes of dragging the matter out as long as possible*” and once again, as in the past, act to the detriment of the plaintiff’s financial position.

[19] The plaintiff therefore asks that the exception be set aside and that punitive costs on a scale of attorney and client be awarded against the excipient.

[20] There are, however, no facts before this court based upon which the above submissions can be made. This court will therefore not entertain them.

[21] In any event, even if plaintiff’s unfounded suspicions, and I do not put it any higher than that, are correct, they have no relevance for the present inquiry. As Schreiner JA held in **Tsose v Minister of Justice and Others 1951 (3) SA 10 (A) at 17G-H**: “*For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal.*” In my view this equally applies to the present matter. The exception is either good or bad, whatever the excipients motive was in bringing it.

[22] The plaintiff’s argument is further that the particulars of claim set out the material facts so sufficiently and with particularity that the excipient “*is completely aware of exactly the case it is to meet*”. Moreover, that the exception strikes at the heart of the *facta probantia*, which the excipient alleges would not be sufficient to sustain a cause of action. In this regard the plaintiff relies on the difference between the *facta probanda* and the *facta probantia*, with reference to the well-known authority of **Jowell v Bramwell-Jones and others 1988 (1) SA 836 (W) at 93A-B** where it was held that:

“*A distinction must be drawn between the facta probanda, or primary factual allegations which every plaintiff must make,*

and the facta probantia, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence.”

- [23] The plaintiff argues that the excipient has failed to dispose of the onus which it bears by limiting itself to a single interpretation of the particulars of claim, as well as not addressing the cause of action but rather the facts which should sustain the cause of action.
- [24] In so far as the damages are concerned, the plaintiff argues that the excipient's exception that an alienation is not pleaded is patently incorrect. This is because, so the argument goes, in action proceedings the plaintiff is not strictly bound to the allegations made in the particulars of claim, but is at liberty to lead oral evidence in the main action, *“which will of course prove the fact that alienation has already occurred”*. It is submitted this will come out in the trial stage of the action, and is not to be adjudicated upon at the pleading stage.
- [25] The plaintiff's criticism is further that the excipient is essentially telling the court that in its view there are no prospects of success and accordingly the exception should stand, rather than making out a case that the pleadings disclose no cause of action.
- [26] It is also argued in the heads of argument on behalf of the plaintiff that since the exception was brought approximately three and a half months after the summons was duly served, it was *“greatly out of time”*. Since no condonation was sought, the excipient is not properly before court and this court accordingly cannot be vested with jurisdiction to hear this matter. This argument was correctly not pursued in oral argument before this court. It is trite that an exception is a pleading and, in the case of an exception to a declaration or combined summons, a notice of bar in terms of rule 26 is

required before the plaintiff can object to the exception on the ground that it was delivered out of time.

DISCUSSION

- [27] I agree with the excipient that the particulars of claim fail to disclose a cause of action. The case as pleaded is that the plaintiff suffered damages because one third of the pension was allowed to be paid out and the fact that the excipient did not take steps to freeze the remainder of the pension fund. I agree with the submissions on behalf of the excipient that the mere fact that the pension benefit was paid out does not mean that the plaintiff suffered damages in view of the provisions of the Divorce Act referred to. What happened is that this “asset” was merely taken out of the joint estate’s one pocket and put into the other.
- [28] Based on the facts as pleaded, the joint estate was not diminished by this being done. The arguments on behalf of the plaintiff cannot be sustained that this is merely the *facta probantia* and not the *facta probanda*. The argument that it will be shown at the trial by the evidence that there was indeed an alienation subsequent to the amount being paid out cannot be upheld. This will be an entirely different cause of action than the one now pleaded. The excipient will accordingly be entitled to raise an objection if such evidence is presented.
- [29] In so far as the remaining capital of the pension fund is concerned also in that regard no valid cause of action is pleaded, which shows that the plaintiff has suffered damages. On the facts as pleaded the pension is still held by the pension fund and without more it cannot be said that the plaintiff suffered damages since that amount has not been frozen. In any event, no facts are pleaded, which shows that there were grounds for the interdict that the plaintiff pleads the excipient ought to have applied for.
- [30] In the result, only taking into account the facts alleged in the particulars of claim and the other facts agreed to by the parties, as I must, I find that the

pleaded case could not, on any basis, as a matter of law, result in a judgment being granted against the plaintiff against the excipient. Both grounds of exception are therefore upheld.

COSTS

[31] I see no reason in this matter for the costs not to follow the event.

[32] In the result, the following order is made.

ORDER

1. The exception is upheld;
2. The plaintiff is afforded ten days within which to file amended particulars of claim that address and cure the grounds of exception, failing which the plaintiff's claim against the defendant is dismissed;
3. In the event that the amended particulars of claim fails to address or cure the grounds of exception, the defendant is entitled to approach the court on the same papers, duly supplemented with the amended particulars of claim, for an order that the action against the defendant be dismissed;
4. The plaintiff is ordered to pay the costs of the exception;
5. In the event that the action is dismissed, the plaintiff is ordered to pay the costs of the action.

H G A SNYMAN

Acting Judge of the High Court of
South Africa, Gauteng Division,
Pretoria

Heard in open court: 5 June 2023

Delivered and uploaded to CaseLines: 31 July 2023

Appearances:

For the plaintiff /
respondent:

Adv XT van Niekerk
Instructed by Riana Brown Attorneys

For the defendant /
excipient:

Adv T Odendaal
Instructed by Savage Jooste & Adams Inc