

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: **5875/2021**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

ELRICH RUWAYNE SMITH N.O.

1st

Plaintiff

KAREN FORTUIN N.O.

2nd

Plaintiff

THEA CHRISTINA LOURENS N.O.

3rd

Plaintiff

(in their capacities as duly appointed trustees
in the insolvent estate of Rorich's Hoop Trust
(I[...]8)

and

GREEN ACRE FARMS (PTY) LTD

Defendant

JUDGMENT BY: I VAN RHYN J

HEARD ON: 18 AUGUSTUS 2023

DELIVERED:

9 OCTOBER 2023

-
- [1] On 17 December 2021 the plaintiffs, in their capacities as the duly appointed trustees in the insolvent estate of Rorich's Hoop Trust (I[...]8) (the "Trust") issued summons against the defendant, a company with registered address at the farm Lexis, Bloemhof, North West Province, claiming an amount of R4 683 421,78. The Trust was finally sequestrated on 19 November 2020. The plaintiffs were finally appointed as trustees of the insolvent estate of the Trust on 30 December 2020.
- [2] Subsequent to the defendant's first notice of its intention to except to the particulars of claim, the plaintiffs amended the particulars of claim. Thereafter the defendant filed a further exception to the plaintiffs' amended particulars of claim on the grounds that it is vague and embarrassing and/or lacks averments necessary to sustain breach of contract as cause of action.
- [3] The exception that the particulars of claim is vague and embarrassing is premised on the following grounds:
- 3.1 In respect of the total outstanding balance of R4 683 421.78 due by the defendant:
- 3.1.1 the plaintiffs failed to set out how the amount is calculated and/or compiled;
- 3.1.2 the plaintiffs failed to state the date on which the "total outstanding balance" due to the Trust allegedly totalled R4 683 421.79, alternatively, amassed to the said amount;
- 3.1.3 in the premises the amount claimed is not set out with sufficient particularity to allow the defendant a reasonable opportunity of assessing and considering the quantum of the amount claimed. Alternatively, the amount claimed is pleaded in an unnecessary and/or inappropriate generalised and vague

manner, embarrassing the defendant who cannot consider, assess and plead thereto.

3.2 In respect of the allegations that the Trust performed its obligations by lending amounts to the defendant at the specific instance and request of the defendant:

3.2.1 plaintiffs' amended particulars of claim is vague and/or silent on the relevant and pertinent details of the individual requests allegedly made by the defendant;

3.2.2 it has not been pleaded in what manner the alleged individual requests for loan amounts were made by the defendant, nor who represented the defendant when the alleged requests were made;

3.2.3 the plaintiffs failed to plead the dates on which the various individual requests for loans were allegedly made by the defendant;

3.2.4 the vague and generalised wording of the amended paragraph 7 of plaintiffs' particulars of claim, embarrass the defendant, who cannot reasonably plead thereto; and

3.2.5 in as far as the plaintiffs rely on an alleged breach of contract by the defendant, it is not alleged when the defendant had breached the agreement.

[4] In support of the allegation that the amended particulars of claim lacks averments necessary to sustain breach of contract as cause of action, the defendant relies on the following:

4.1 It is the plaintiffs' case that one of the terms of the alleged agreement was that the outstanding amount was payable on demand. It is not pleaded-

4.1.1 how payment was demanded;

4.1.2 in what amount payment was demanded;

4.1.3 when the demand was made;

4.1.4 what the terms of the demand were (e.g. was the defendant allowed a specific time after the demand to settle the amount).

4.2 The plaintiffs failed to plead the particulars of the Trust's alleged performance in terms of the loan agreement, other than to generally state in the amended paragraph 7 that the Trust "...had performed its obligations...by lending amounts to the Defendant at the specific instance and request of the Defendant".

No allegations are made as to-

4.2.1 when the various alleged individual requests were made or what the nature and extent of the individual request(s) were;

4.2.2 what amount(s) were advanced in response to each individual request;

4.2.3 on what dates amount(s) were advanced by the Trust;

4.2.4 what amount(s) were advanced directly to the defendant; and

4.2.5 what amount(s) were advanced as payment of expenses on the defendant's behalf;

4.2.6 who represented the defendant when each alleged request for payment was made.

4.3 The plaintiffs failed to plead how the amount claimed is calculated with the result that the defendant is not placed in a position to reasonably assess the quantum of the plaintiff's claim;

4.4 The plaintiffs failed to plead on what date the alleged outstanding balance amounted to the sum of R4 683 421.78;

4.5 The plaintiffs failed to plead that the plaintiffs elected to continue with the alleged loan agreement between the Trust and the defendant. The agreement between the Trust and the defendant was concluded during 2013. The Trust was sequestrated during 2020. Certain transactions between the Trust and the defendant continued/continued subsequent to the date of sequestration.

[5] It is a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. The purpose of pleadings is to define the issues to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; and the cause of action or defence must appear clearly from the factual allegations made. This must be seen against the background of the abolition of requests for further particulars of pleading.

[6] Rule of Court 18(4) provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto. In **Trope v South African Reserve Bank and Another and Two Other Cases**¹ the requirements were explained as follows:

“It is trite that a party has to plead - with sufficient clarity and particularity - the material facts upon which he relied for the conclusion of law he wishes the Court to draw from those facts (Mabaso v Felix 1981 (3) SA 865 (A) at 875A-H; Rule 18(4)). It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it. (Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 792J-793G.)”

¹ 1993 (3) SA 264 (A) at 273A-B,

In order for a claim to disclose a cause of action, a plaintiff's pleading must set out "... every fact (material fact) which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court".²

- [7] The requirement regarding the material facts which has to be set out in the pleading was explained as follows in **Jowell v Bramwell-Jones and Others**³ :

"... (T)he plaintiff is required to furnish an outline of its case. This does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements."⁴

- [8] The plaintiffs' cause of action is based upon an oral loan agreement concluded between the Trust and the defendant. In a claim based on a loan the plaintiff must allege and prove:

8.1 the loan;

8.2 the money was advanced under the agreement; and

8.3 the loan is repayable.⁵

In the matter at hand the plaintiffs' particulars of claim are simply based on money lent and advanced. Claims for debts and liquidated demands are dealt with in Rule 17(2)(b) which provides that in such a case "the summons shall be as near as may be in accordance with Form 9 of the First Schedule".

² McKenzie v Farmers Co-Operative Meat Industries Ltd 1922 AD 16 at 23.

³ 1998 (1) SA 836 (W)

⁴ at 913B-G

⁵ Amlers: Precedents of Pleadings ; 9th Edition; Harms; p252; Claim-for repayment.

- [9] Mr Els, counsel on behalf of the plaintiffs, argued, with reference to **McKenzie v Farmers' Co-Operative Meat Industries Ltd**⁶ that the plaintiffs complied with the definition of “cause of action” and that “...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court” is contained in the amended particulars of claim. On behalf of the plaintiffs it is contended that care must be taken in every case to distinguish the facts which must be proved in order to disclose a cause of action (the *facta probanda*) from the facts which prove them (the *facta probantia*).
- [10] An exception is a legal objection to the opponent’s pleading and a defect inherent in the pleading. The allegations in the pleading that forms the subject of the exception are accepted to be correct for purposes of adjudicating the exception. Although a cause of action appears from the pleading, the objection is aimed at some defect or incompleteness in the manner in which the claim is set out which results in embarrassment to the defendant.⁷
- [11] The plaintiff’s claim is undoubtedly for debts. If regard is had to the provisions of Rule 17(2)(b) and the precedents for a claim for payment based upon an oral agreement, the plaintiffs claim is simply based on money lent and advanced which could have been claimed in terms of the provisions of Rule 17(2)(b). The correct approach to such a summons was set out by Berman and Selikowitz JJ in **Volkskasbank Limited v Wilkinson and three similar cases**⁸:

“It appears to us accordingly that where a plaintiff sues for repayment of a loan (or an overdraft) all that a simple summons need contain is a statement setting out the relief claimed and a succinct outline of the cause of action, i.e. that an agreement of loan (or of overdraft) was concluded between the parties providing for interest on the balance outstanding from time to time at a specified (or ascertainable) rate and which loan (or overdraft) was repayable on demand (or on a fixed or ascertainable date) and which, despite demand (or the arrival of that date), has not been

⁶ 1922 AD 16 at 23.

⁷ Trope (supra) at 268F.

⁸ 1992 (2) SA 388 (C) at 397I – 398B .

repaid. Where the cause of action is founded on some document, reference thereto should be made in the summons and a copy thereof should be attached to the summons and the original should be handed in at the time when the application for default judgment is made

The simple point is that all that is required of the summons, as far as the cause of action need be set out, is that the defendant should be made aware of why (and for what relief) he is being called upon to answer to plaintiff's claim, and if the summons adequately serves that purpose, no more is needed of the plaintiff when applying for judgment in cases where the defendant, duly served, elects ... [not] ... to defend the action."

[12] The plaintiff's *facta probanda* are pleaded in the following paragraphs in the particulars of claim:

"5.1 During or about 2016, the exact date being unknown to the Plaintiffs, and at Hoopstad, the Trust and the Defendant entered into an oral agreement";

"6.1 The Trust will lend amounts to the Defendant from time to time and on the specific instance and request of the Defendant";

"6.2 The amounts which the Trust lends to the Defendant will either be paid to the Defendant directly or the Trust will pay expenses on the Defendant's behalf";

"6.3 The loan, consisting of the amounts advanced to or on the Defendant's behalf, will be reflected in the Defendant's financial statements";

"6.4 The loan will bear not interest as mutually agreed upon between the parties, alternatively, the loan will bear interest at the mora interest rate on overdue amounts";

"6.5 The loan has no fixed term of repayment and is therefore payable on demand";

“7 The Trust performed its obligations in terms of the agreement by lending amounts to the Defendant on the specific instance and request of the Defendant”;

“8 The total outstanding amount due by the Defendant to the Trust in terms of the agreement amounts to R4 683 421.78”;

[13] I quote from the headnote of the Judgment in **Francis v Sharp and others**⁹ as published:

“... The Court dismissed each exception. While the particulars of claim could have been more clearly stated, they were not vague and embarrassing to the extent that substantial prejudice to the Defendants would result, were they allowed to stand. The Plaintiff had pleaded the existence of the agreement, its terms, its breach and the manner of breach. The particulars of claim did not prevent the Defendants from putting up their version. It was the function of the Court to resolve ambiguities, uncertainties and disagreements concerning the existence of an agreement or its terms. However, this was best achieved with reference to evidence. The exception procedure was not the appropriate mechanism by which to do so. Most of the exceptions would be more properly dealt with in pleadings. Others were devoid of any merit whatsoever.” (Emphasis added).

It should be noted that in the **Francis v Sharp** matter the defendants excepted to the particulars of claim on twenty-eight (28) grounds.

[14] The grounds upon which the defendant relies that the amount claimed is vague and causes embarrassment are that the plaintiffs failed to set out how the amount is calculated and how and over which period the alleged total amassed to the amount claimed, R 4 683 421.78. During argument, Ms Wright, counsel on behalf of the defendant argued that a greater degree of particularity is required.

⁹ [2003] 2 All SA 201 (C).

- [15] The plaintiffs are merely required to plead a summary of the material facts. An attack on a pleading as being vague and embarrassing cannot be found on the mere averment of lack of particularity¹⁰. There are no inconsistencies amounting to contradictions which could amount to vagueness and embarrassment. The omission of the dates and/or time period over which the amount claimed amassed to R 4 683 421.78 does not lead to the particulars of claim being vague or embarrassing. On behalf of the plaintiffs it was submitted that where the complaint is one of lack of particularity the remedy is to request discovery or further particulars. I agree.
- [16] The grounds upon which the defendant relies that the particulars of claim are vague and/or silent on the individual request for loans, in what manner and when such request were made and that the vagueness and generalised wording of the particulars of claim, embarrasses the defendant because it cannot reasonably plead thereto, the defendant again attacks the lack of particularity of the particulars of claim. Nothing prevents the excipient from pleading its version. The defendant may deny that the parties had entered into the agreement as pleaded by the plaintiff or plead its version regarding the terms of the oral agreement. The particulars of claim is not meaningless or capable of more than one meaning. Neither is the particulars of claim embarrassing.
- [17] The details which are lacking, as set out by the defendant, amounts to *facta probantia* and not *facta probanda*. The lack of particularity are capable of being remedied by a request for discovery or further particulars for trial. I am not convinced that the exception taken that the particulars of claim is vague and embarrassing strikes at the root of the cause of action. The particulars of claim, read as a whole and not a particular paragraph, identifies the issues relied upon by the plaintiffs and in respect whereof evidence will be led at the coming trial.
- [18] I am of the view that the plaintiffs provided sufficient particulars that requests were made by the defendant over a period of time since 2016 for loans. I therefore fail to see how the failure to plead particulars concerning each individual request on each specific date could lead to any vagueness or embarrassment. The defendant did not

¹⁰ Absa Bank v Boksburg Transitional Local Council 1997 (2) SA 415 (W) at 418.

indicate how it would be prejudiced if the plaintiffs' particulars of claim is not allowed to stand as it is.

- [19] In respect of the ground that the particulars of claim does not sustain breach of contract as cause of action in that it was not pleaded how, when, in what amount payment was demanded, and the terms of the demand, it is relevant to have regard to the averment that the plaintiffs pleaded that the defendant breached the terms and conditions of the agreement by failing to pay the outstanding balance due upon demand by the plaintiff, alternatively summons constitutes demand.
- [20] A complete cause of action based upon an oral loan would be complete if the plaintiffs averred that the loan was repayable and that, as in this matter, where no date for repayment has been agreed upon, a demand was made for repayment. It would be sufficient if it was pleaded that the summons constitutes demand. Demand in the form of summons has been complied with. I therefore fail to see how the defendant can allege that failure to plead the date or time of the demand, how it was made or the terms of the demand would render the particulars of claim excipiable. If the defendant did not receive any demand and denies same, it should be pleaded accordingly.
- [21] Regarding the ground of exception that the plaintiffs' failure to plead the particulars of the Trust's performance in terms of the loan agreement, other than to generally state in the amended paragraph 7 that the Trust performed its obligations by lending amounts to the defendant at specific instance and request of the defendant, the complaint is again regarding lack of particularity. It is contended on behalf of the defendant that the "essential elements" of the plaintiffs' cause of action are the date of each request, the amount thereof, whether such request was for a direct loan or for expenses to be paid and a description of such particular expense.
- [22] I do not agree with the defendant. What the defendant is demanding is not merely an "outline" of the plaintiffs' case but a complete "framework like a crossword puzzle in which every gap can be filled by logical deduction"¹¹. Having regard to the facts of this matter, the period of the loan spans a period of approximately 8 years. In order to

¹¹ Jowell v Bramwell- Jones (supra) at 913 B-G.

disclose a cause of action, the plaintiff's pleading must set out 'every fact (material fact) which it would be necessary for the plaintiffs to prove, if traversed in order to support their right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact.

[23] **In McKelvey v Cowan NO¹²** it was held as follows:

"It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action."

I am not convinced that, on assuming the correctness of the factual averments made by the plaintiffs that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.¹³

[24] The ground that the amount claimed by the plaintiffs have not been set out in a manner which enables the defendant to reasonably assess the quantum thereof makes reference to the fact that financial statements and an Account Transactions Report, which had originally been appended to the particulars of claim has, with the amendment, been removed as annexures. In their heads of argument, the plaintiffs contend that the defendant is not allowed to refer to annexures which formed part of the particulars of claim prior to the amendment.

[25] I agree with the submission on behalf of the plaintiffs that the court must look at the pleading excepted to as it stands without reference to any other document which does not form part of it. The amount claimed by the plaintiffs is R 4 683 421.78 Nothing prevents the defendants from pleading its version pertaining to the amount claimed. It may plead that no amount is due to the plaintiffs or its version regarding the amount due to the plaintiffs without any embarrassment or prejudice. This ground for exception cannot be upheld.

¹² 1980 (4) SA 525 (Z) at 526.

¹³ Voget v Kleynhans 2003 (2) SA 148 (C) at 151.

[26] The exception, on any of the grounds contended by the defendant cannot be upheld.
There are no reasons why the costs should not follow the result.

[27] Accordingly, **IT IS ORDERED THAT:**

1. The exception is dismissed with costs.

I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Plaintiffs:

Instructed by:

ADV. J ELS
PHATSHOANE HENNEY INC ATTORNEYS
BLOEMFONTEIN

On behalf of the Defendant:

WRIGHT

Instructed by:

ADV. G J M
HORN & VAN RENSBURG ATTORNEYS
BLOEMFONTEIN