



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D918/2019

In the matter between:

ANUSAAYA SUKDEV

PLAINTIFF

and

SHERIFF INANDA AREA 1

FIRST DEFENDANT

RAJESH NARAYAN

SECOND DEFENDANT

SUNIL SINGH (AKA ZAIN)

THIRD DEFENDANT

ORDER

The following order is granted:

1. The exceptions are upheld with costs.
2. The plaintiff is given leave to amend her particulars of claim within ten days of the grant of this order.
3. If the plaintiff fails to amend her particulars of claim in the time period referred to in paragraph 2, then the defendants are given leave to set the matter down, with notice to the plaintiff, for an order striking out the plaintiff's claim and granting judgment in favour of the defendants with costs.
4. The application to strike out is removed from the roll with no order as to costs.

JUDGEMENT

HENRIQUES J

Introduction

[1] This opposed application concerns two exceptions raised by the defendants as well as an application to strike out specific paragraphs in the plaintiff's particulars of claim which the defendants allege are scandalous, vexatious and/or irrelevant. For the sake of convenience, I will refer to the parties as they are cited in the action.

Issues for determination

[2] The issues for determination are the following:

- (a) Are the particulars of claim excipiable on the basis that they are vague, thereby causing the defendants embarrassment and prejudice in pleading and because no cause of action is disclosed?
- (b) Should certain allegations in the particulars of claim be struck out on the basis that they are scandalous, vexatious and/or irrelevant?
- (c) Costs occasioned by the exceptions and application to strike out.

The action

[3] The plaintiff instituted an action against the defendants by way of a combined summons dated 7 February 2019. The particulars of claim are some 29 pages long and from what I can discern, contain approximately four claims which the plaintiff alleges are for 'specific, consequential and general damages arising from the defendants' actions'.

[4] Claim 1 relates to the loss of the plaintiff's home; claim 2 relates to legal fees and disbursements which have been claimed from the plaintiff; claim 3 is a claim for a shortfall due to Standard Bank, being the difference between the outstanding bond payment due to Standard Bank and the proceeds received from the sale of the property; and claim 4 is a claim for general damages for alleged emotional hardship and trauma as a consequence of the plaintiff losing her home.

[5] The defendants, after defending the action, filed a notice to cure in terms of Uniform rule 23(1) in which it was contended that the plaintiff's particulars of claim

were vague and embarrassing, causing the defendants prejudice in pleading and did not sustain a clear cause of action, specifically a cause of action in delict. Simultaneously with this notice, the defendants filed a notice in terms of Uniform rule 23(2) seeking to strike out a significant number of paragraphs in the particulars of claim on the basis that they are scandalous, vexatious and/or irrelevant.¹

The exceptions

[6] As the plaintiff did not cure the cause of complaint, the defendants filed the two exceptions on 21 May 2019. The first exception alleges that the exact nature of the plaintiff's claim was not clear. The defendants assumed that the claim was a delictual claim, based on fraud. They indicate that such particulars did not disclose a cause of action as in essence, there were no allegations that one or more of the defendants intended the court or any other party to be deceived by the alleged false returns of service and there was no allegation that the loss allegedly suffered by the plaintiff was reasonably foreseeable by them.

[7] The defendants allege that the particulars of claim, specifically paragraphs 6.77.2 to 6.77.4 do not disclose a cause of action as the plaintiff does not allege any statutory, legal or other duty on the defendants to conduct themselves on the basis alleged in those paragraphs. In summary, the defendants allege that the plaintiff's particulars of claim do not disclose a cause of action in respect of all four claims pleaded.

[8] In the second exception, the defendants contend that the plaintiff's particulars of claim are vague and embarrassing and cause them prejudice in pleading. The second notice in paragraphs 3 to 13 sets out the basis upon which the defendants indicate that they are embarrassed and prejudiced in pleading, with reference to specific paragraphs in the particulars of claim and the four claims. From paragraph 14 onwards, the notice sets out the paragraphs in the particulars of claim which contain irrelevant allegations and which constitute *facta probantia*.

¹ The particular paragraphs are set out in detail in the notice in terms of rule 23(2).

[9] At the hearing of the application, I enquired from Mr Pillay precisely what the plaintiff's cause of action was, and he explained in approximately six paragraphs that the plaintiff's claim was a delictual claim arising out of an alleged fraud on the part of the defendants. He essentially set out the plaintiff's claim as it ought to have been pleaded in the particulars of claim.

Analysis

[10] Uniform rule 23(1) makes provision for a party to take an exception where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain a cause of action or defence. Uniform rule 23(2) makes provision for pleadings which contain averments which are scandalous, vexatious or irrelevant to be struck out after a party has been given notice to cure such pleadings.

[11] An exception is an objection to an opponent's pleading and commences on the premise that the allegations in a summons or particulars of claim are true, but asserts that the pleadings do not disclose a cause of action, or are vague and embarrassing. Where an exception has been taken, a court must consider the pleadings excepted to as they stand.² To succeed, an excipient has an obligation to persuade the court that upon every interpretation of the pleading in question, no cause of action is disclosed. This is in keeping with the object of an exception which 'is to dispose of the case or a portion thereof in an expeditious manner, or to protect a party against an embarrassment which is so serious as to merit the costs even of an exception'.³

[12] The excipient has a duty to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it.⁴ When deciding an exception, a court should do so sensibly and not in an over-technical manner. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*,⁵ Harms JA held the following:

² *Salzmann v Holmes* 1914 AD 152 at 156; *Minister of Safety and Security and another v Hamilton* 2001 (3) SA 50 (SCA) para 5.

³ DE van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* (RS 20, 2022) at D1-296.

⁴ *Lewis v Oneanate (Pty) Ltd and another* 1992 (4) SA 811 (A) at 817F-G.

⁵ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3.

‘Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that “cuts through the tissue of which the exception is compounded and exposes its vulnerability”.’

[13] These considerations do not apply to an exception taken that a pleading is vague and embarrassing. Such an exception is not directed at a particular paragraph within a cause of action. It goes to the entire cause of action. It ‘strikes at the formulation of the cause of action and not its legal validity’.⁶ In *Trope v South African Reserve Bank*,⁷ McCreath J held the following:

‘An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced . . . As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test . . . It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading.’

[14] A summons can be ‘vague and embarrassing where it is not clear whether the plaintiff sues in contract or in delict, or upon which of two possible delictual bases he sues. . .’.⁸ (Footnote omitted.)

[15] It is a basic principle of our law that particulars of claim must be so worded ‘that a defendant may reasonably and fairly be required to plead thereto . . . [and] that the object of pleadings is 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; the cause of action or defence must appear clearly from the factual allegations made.’⁹

⁶ *Trope and others v South African Reserve Bank* 1993 (3) SA 264 (A) at 269I-J.

⁷ *Trope v South African Reserve Bank and another and two other cases* 1992 (3) SA 208 (T) at 211A-E.

⁸ DE van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* (RS 20, 2022) at D1-305.

⁹ *Trope v South African Reserve Bank and another and two other cases* 1992 (3) SA 208 (T) at 210G-I.

[16] Uniform rule 18(4) requires that every pleading must contain ‘a clear and concise statement of the material facts upon which the pleader relies for his claim’. In *McKenzie v Farmers’ Co-operative Meat Industries Ltd*¹⁰ the following definition of cause of action was adopted by the then Appellate Division:

‘...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’

[17] The object of a pleading is to ascertain what the issues between the parties are and this can only be established when a party states its case with precision. Obviously the degree of precision will depend on the facts of a particular case. To achieve this ‘Pleadings must be lucid, logical and intelligible. A litigant must plead his cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he has to meet. A litigant who fails to do so may not thereafter advance a contention of law or fact if its determination may depend on evidence which his opponent has failed to place before the court because he was not sufficiently alerted to its relevance.’¹¹

[18] Pleadings which are a ‘. . . rambling preview of the evidence proposed to be adduced at the trial’ fall foul of the provisions of rule 18(4) and would be vague and embarrassing.¹² I raised with Mr Pillay during the course of the hearing that what is required are “material facts” and one must be able to distinguish between the *facta probanda* and the *facta probantia*. In other words, ‘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.’¹³ This follows what was reiterated in *McKenzie*¹⁴ and *Nel and others NNO v McArthur and others*.¹⁵

¹⁰ *McKenzie v Farmers’ Co-operative Meat Industries Ltd* 1922 AD 16 at 23, quoting from *Cooke v Gill* LR 8 CP 107.

¹¹ *National Director of Public Prosecutions v Phillips and others* 2002 (4) SA 60 (W) para 36.

¹² *Moaki v Reckitt and Colman (Africa) Ltd and another* 1968 (3) SA 98 (A) at 102A-B.

¹³ *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (W) at 903A-B.

¹⁴ *McKenzie v Farmers’ Co-operative Meat Industries Ltd* 1922 AD 16.

¹⁵ *Nel and others NNO v McArthur and others* 2003 (4) SA 142 (T).

[19] In *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd*,¹⁶

Patel J, after quoting what Heher J had stated in *Jowell*, said the following:

‘It is therefore incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be lead, in an intelligible and lucid form and which allows the defendant to plead to it.’

[20] Heher J in *Jowell* said the following:

‘The plaintiff is required to furnish an outline of his case. That does not mean that the defendant is entitled to a framework like a cross-word 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.’¹⁷

[21] I agree with the submissions that the particulars of claim are excipiable. In so far as the plaintiff relied for her claim on:

(a) the defendants attending to multiple attempts at execution absent any instructions to do so: the particulars of claim disclose no cause of action as there was no sustainable allegation that the defendants could not effect multiple attempts absent an instruction; and

(b) the defendants engaging a locksmith without instructions to do so: the particulars of claim disclose no cause of action as there is no allegation that the defendants could only engage the services of a locksmith on receipt of an instruction from the creditor's attorneys.

[22] In respect of claim 1, the particulars do not disclose a cause of action as the plaintiff alleges the current market value of her home as being R1.5 million. It is alleged that the defendants are liable to compensate her for the market value of the property

¹⁶ *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* 2006 (2) SA 25 (T) para 18.

¹⁷ *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (W) at 913F-G.

at the time of judgment. However, there is no allegation in the particulars of claim that the market value of the property at the time of the judgment was R1.5 million.

[23] In respect of claim 2, which is a claim for legal fees and disbursements, the particulars of claim disclose no cause of action in terms of which the liability for such expenses by the defendants arises.

[24] No cause of action in respect of claim 3 is disclosed as the plaintiff claims repayment of the shortfall she was required to pay to Standard Bank. In respect of claim 1, the plaintiff seeks to be returned to the position she would have been, had her property been sold for market value. Had she in fact sold her property for market value or otherwise, she would still have been obliged to discharge her indebtedness to Standard Bank in terms of the bond, as claimed under claim 3. No cause of action is disclosed in respect of the plaintiff's claim for general damages under claim 4.

[25] The defendants have adopted the approach and assumed that the plaintiff's claim is founded in delict. They submit that no cause of action is disclosed as claims 1, 2 and 3 are for pure economic loss. Any conduct which causes such loss, is not *prima facie* wrongful. It was consequently necessary for the plaintiff to plead a legal duty as part of the element of wrongfulness, and no such legal duty has been pleaded. For these submissions, the defendants rely on *Country Cloud Trading CC v MEC, Department of Infrastructure Development*¹⁸ and *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*.¹⁹

[26] Regarding the fault element, the particulars of claim did not contain any allegations of negligence, but there are scattered mentions of fraud throughout the pleadings. The plaintiff ought to have alleged the necessary *dolus* and that the defendants intended the court to rely on the fraudulent returns of service to induce the

¹⁸ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) para 22.

¹⁹ *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) para 14.

court to declare the property executable. General allegations of fraud are not sufficient to infer liability on the part of the defendants.²⁰

[27] In addition, the defendants submit that there are no direct allegations of causation and that but for the alleged inaccurate content in the respective returns of service, the immovable property would not have been declared executable. Lastly, the plaintiff, given that these are claims for pure economic loss, ought to have alleged that such loss was reasonably foreseeable in the circumstances.²¹ I agree with these submissions and the authorities referred to.

[28] Mr Pillay, who appeared for the plaintiff, submitted that given the nature of the claims and the actual history which led to the institution of the action, it was necessary for the plaintiff to plead in the manner that she has done. He conceded that, although she has pleaded *facta probantia*, she has also in addition pleaded *facta probanda* given the nature of her claims.

[29] He submitted that the plaintiff has ‘exhaustively particularised the basis of her claims, relying predominantly on documentation extracted from the defendant’s possession’. It was necessary for the plaintiff to meticulously and chronologically set out all the facts she relies on, so as not to prejudice the defendants and to make them aware, not only of the cause of action but also of the evidence which she intended to present at the trial of the matter. The plaintiff was consequently obliged to plead her case with ‘specificity’. He further submitted that this was also due to the fact that the allegations which she made are serious and are not restricted to allegations of misconduct, but also of fraud. He acknowledged, however, correctly so in my view, that the pleadings are not lucid or logical and did not comply with rule 18(4).

[30] I am of the view that the exceptions set out in detail the failings in the plaintiff’s particulars of claim. However, it behoves me to mention that the particulars of claim consist of unstructured allegations containing inferences and legal conclusions which

²⁰ *Home Talk Developments (Pty) Ltd and others v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; 2018 (1) SA 391 (SCA) para 31.

²¹ *Ibid* para 57, per the concurring judgment by Schippers AJA.

disregard the imperatives of pleading, namely: conciseness, lucidity, logic, clarity and precision. It is not the function of the court, no matter how benevolent it may be in reading the particulars of claim, to prune or rid the particulars of claim of *facta probantia*.

The application to strike out

[31] Turning now to the application to strike out, the defendants sought to strike out some 46 paragraphs in the particulars of claim on the basis that these paragraphs contained allegations which were scandalous, vexatious and irrelevant. At the hearing of the matter, I enquired from Mr Boulle and Mr Pillay, who appeared for the parties, whether it would be necessary to decide the strike out application in the event of the exceptions being upheld. They agreed that it would not be necessary to do so if the exceptions were upheld. I was advised by Mr Boulle that the application to strike out was instituted out of an abundance of caution. In light of the conclusions that I have come to in relation to the two exceptions, it is not necessary for me to deal with the application to strike out. By agreement with the parties' legal representatives, such application is removed from the roll with no order as to costs.

Costs

[32] In relation to the costs occasioned by the upholding of the exceptions, I see no reason to depart from the normal rule that the successful party is entitled to its costs.

Conclusion

[33] The delivery of the judgment has regrettably been delayed by a number of factors. The first being that I have not had the necessary secretarial support for a considerable period of time. This has been brought to the attention of the Office of the Chief Justice as well as the Judge President, Acting Judge President and Deputy Judge President of the division.

[34] In addition, subsequent to the hearing of the matter, the plaintiff's attorney of record sadly passed away. Several enquiries with the Law Society by the interns and persons assigned to assist me did not reveal whom the new attorney of record was who had been assigned the matter. The new registrar assigned to me was however

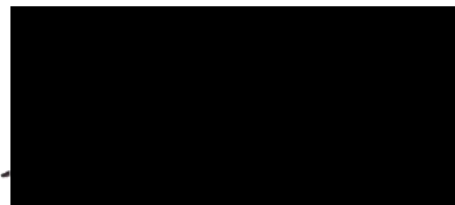
able to obtain the plaintiff's details from the defendants' attorney of record. The plaintiff has not appointed new attorneys of record.

[35] Having found myself in agreement with the exceptions raised, I am of the view that the plaintiff ought to be given an opportunity to amend her particulars of claim. The form of the order in these matters is what was stated by the Supreme Court of Appeal in *Ocean Echo Properties*.²² However, given that the plaintiff is unrepresented I have amended the form of the order and made provision for the matter to be re-enrolled on notice to her.

Order

[36] In the result the following orders will issue:

1. The exceptions are upheld with costs.
2. The plaintiff is given leave to amend her particulars of claim within ten days of the grant of this order.
3. If the plaintiff fails to amend her particulars of claim in the time period referred to in paragraph 2, then the defendants are given leave to set the matter down, with notice to the plaintiff, for an order striking out the plaintiff's claim and granting judgment in favour of the defendants with costs.
4. The application to strike out is removed from the roll with no order as to costs.



HENRIQUES J

²² *Ocean Echo Properties 327 CC and another v Old Mutual Life Assurance Company (South Africa) Ltd* [2018] ZASCA 9; 2018 (3) SA 405 (SCA) para 8.

Case Information

Date of Argument : 5 June 2020
 Date of Judgment : 14 June 2023

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This judgment was handed down electronically by circulation to the plaintiff and the defendants' representatives by email. The date and time for hand down is deemed to be 09h30 on 14 June 2023.