

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

Reportable:	NO
Of interest to other Judges:	NO
Circulate to Magistrates:	NO

CASE NO: 1691/2023

In the matter between:

NTHANDO MASEKO

FIRST PLAINTIFF/FIRST RESPONDENT

LERATO MASEKO

SECOND PLAINTIFF/SECOND RESPONDENT

and

ALLANDIN'S RING TRADING 519cc t/a VILJOEN'S CONSTRUCTION

FIRST DEFENDANT/FIRST EXCIPIENT

MR. LANCE LUCAS

SECOND DEFENDANT/SECOND EXCIPIENT

HEARD ON: 10 November 2023

CORAM: JORDAAN, AJ

DELIVERED ON: 15 April 2024

- [1] This is an exception by the Defendants against the Plaintiffs' particulars of claim on the ground that it lacks averments necessary to sustain a cause of action. The exception is opposed by the Plaintiffs.
- [2] During January 2019 the Plaintiffs, represented by the First Plaintiff, entered into a building contract with the First Defendant, who was represented by the Second Defendant during the conclusion of same.¹ In terms of this building contract, the First Defendant was to supply the building material and build a double storey house, in phases, for the Plaintiffs- who in turn bore the responsibility to pay the contractor for each building phase.²
- [3] On the 4th of April 2023, the Plaintiff instituted action against the Defendants, founding their claim for damages in the amount of R677 003.77, on the Defendants failure to perform in terms of the building contract.³
- [4] It is to these particulars of claim, that the Defendants raise the exception. The exception is based on four grounds in the following terms⁴: -

" FIRST GROUND OF EXCEPTION

- 5. The only grounds upon which the second defendant is cited in the particulars of claim is based on his capacity as the first defendants agent and representative.*
- 6. Where an agent conclude a contract in his capacity as agent, whether he discloses the name of his principal or not, only the principal acquires rights or obligations under the contract.*
- 7. The agent cannot personally be sued under the contract, nor can he be sued in his own name, as representing his principal.*
- 8. In the premises, the cause of action relied on by the plaintiff's, ex facie, does not lie against the second defendant as the second defendant does not have a direct and substantial interest in the subject matter of the action.*

¹ Paginated Bundle: Particulars of Claim page 3 paragraphs 3.1 to 3.2

² Paginated Bundle: Particulars of Claim page 3 to 4 paragraphs 3.3.1 to 3.3.6

³ Paginated Bundle: Particulars of Claim pages 9 to 10 paragraphs 5 and 6

⁴ Paginated Bundle: Exception pages 24 to 27 paragraphs 5 to 22

SECOND GROUND OF EXCEPTION

9. *The plaintiffs allege in paragraph 5.1.2 of the particulars of claim that the first defendant did not supply proof of approval from the NHBRC and the local authority for both phase 1 and 2.*
10. *Their alleged failure by the first defendant to supply the plaintiffs with proof of approval from the NHBRC are C and the local authority for phases 1 and 2 has not been pleaded as a material nor implied, alternatively tacit term of the agreement, nor was such term agreed to between the parties in the unmarked building contract annexed to the particulars of claim.*
11. *In the premises, the plaintiffs seek to hold the first defendant liable to a term which had not been pleaded nor agreed to between the parties. The particulars of claim therefore lack averments that are necessary to sustain a cause of action.*

THIRD GROUND OF EXCEPTION

12. *The unmarked building contract annexed to the particulars of claim does not specify that the works and all its component parts are to be performed by a scheduled specified date or dates.*
13. *The plaintiff's likewise do not plead that the first defendant had to complete the scheduled works or any component part thereof by a specified scheduled date or dates.*
14. *In the absence of any contractually agreed timeframe to establish a right to cancel an agreement due to a material breach by the other party, the non-defaulting party must first place the defaulting party in default by way of a written notice to the defaulting party.*
15. *The plaintiffs failed to provide the first defendant with a written notice of default.*
16. *The first defendant was entitled to know in advance if and exactly when it was supposed to be in mora.*
17. *In the premises the first defendant is not in mora and the plaintiffs are not entitled to claim damages from the first defendant as a result of the plaintiffs' failure to give due notice that the first defendant is to perform by a determined or determinable date. The particulars of claim therefore lack averments that are necessary to sustain a cause of action.*

FOURTH GROUND OF EXCEPTION

18. *The cause of action relied on by the plaintiffs is based on contractual damages suffered by the plaintiffs, as a result of the alleged failure of the first and second defendant to perform their obligations in terms of the unmarked written building contract, annexed to the particulars of claim.*
19. *A plaintiff who seeks damages for an alleged breach of contract is entitled to a decree of specific performance, with or without damages, or to an order cancelling the contract.*
20. *The plaintive failed to allege in the particulars of claim whether they seek an order for specific performance or an order of cancellation of the building contract.*
21. *In the event that the plaintiffs seek an order for cancellation of the contract on the ground of the alleged breach of the building contract by the first defendant, the plaintiffs failed to allege that:*
 - 21.1 *the right to cancellation has accrued because the breach is material;*
 - 21.2 *a clear and unequivocal notice of cancellation was conveyed to the first and second defendant;*
 - 21.3 *the building contract was cancelled by the issuing of summons.*
22. *In the premises, the building contract between the parties remains in force and both parties will have to adhere to all their rights and obligations in terms of the contract."*

[5] Rule 23(1) of the Uniform Rules of Court provide for two grounds of exception namely:

- a. that the pleading is vague and embarrassing; or
- b. that the pleading lacks averments which are necessary to sustain an action or defence, as the case may be.

[6] An exception is a pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action or the specific defence relied upon.⁵

⁵ Herbstein and van Winsen: The Civil Practice of the High Courts of South Africa, Fifth edition, page 630

[7] As a result, where an exception is taken, a court should look only to the pleading excepted to as it stands and thus take the facts alleged in the pleading as correct.⁶ This is however limited in operation to allegations of fact, and cannot be extended to inferences and conclusions not warranted by the allegations of fact. This principle does not stultify a court to accept facts which are manifestly false and so divorced from reality that they cannot possibly be proved.⁷

[8] The general principles governing exceptions were summarised by Makgoka J in the case of *Living Hands (Pty) Ltd v Ditz*⁸ as follows:

"(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars."

[9] In order to disclose a cause of action, the Plaintiff's pleading must set out "every fact (material fact) which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not

⁶ *Marney v Watson* 1978 (4) SA 140 (C) at 144

⁷ *Voget v Kleynhans* 2003 (2) SA 148 (C) at 151

⁸ 2013 (2) SA 368 (GSJ)

*comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.*⁹

- [10] It is trite that where an exception is taken to a pleading that no cause of action is disclosed, the excipient carries the onus to demonstrate 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.¹⁰
- [11] On behalf of the Defendants it was submitted that for the reasons expounded in the various grounds of exception, there is a lack of averments necessary to sustain a cause of action. In the first ground of exception the Defendants except to the citation of the Second Defendant as being solely based on his capacity as a representative and agent¹¹ of the First Defendant. The pleadings disclose that where the Plaintiffs plead obligations it is only in respect of the First Defendant and breach solely in respect of the First Defendant.¹²
- [12] The Plaintiff's responded to this first ground of exception and submitted that the Second Defendant has an interest in the Corporation and though referred to as a "representative and agent", it must be construed in the context of the citation of the First Defendant, being the Close Corporation. This the Plaintiffs submitted, while simultaneously submitting that the First Defendant exist separately from its members and the Second Defendant exists separately from the Corporation.
- [13] It was further submitted on behalf of the Plaintiffs that this citation of the Second Defendant does not constitute a substantive point of law in respect of a cause of action and is thus not a ground of exception, but a citation the Defendants may admit or deny in their plea.

⁹ Herbstein and van Winsen: The Civil Practice of the High Courts of South Africa, Fifth edition, page 638 to 639

¹⁰ Vermeulen v Goose Valley Investments (Pty) Ltd 2001(3) SALR (A)

¹¹ Paginated Bundle: Particulars of Claim page 6 paragraphs 1.4

¹² Paginated Bundle: Particulars of Claim pages 7 to 8 paragraphs 3.1.1 to 3.3.4 and 5.1

- [14] It is indeed the procedure that where the question of non-joinder or misjoinder arises, it is raised by way of a special plea but it is well established that non-joinder and misjoinder can be raised by way of exception. In *Royce Shoes (Pty) Ltd v McIndoe and Others NNO*¹³ it was held that the formulation of rule 23(1) has not done away with the right of a litigant to raise misjoinder or non-joinder by way of exception, provided the objection can be sustained *ex facie* the pleading to which exception is taken, without reliance on extraneous facts.
- [15] I align myself with the contentions of the Defendants that *ex facie* the pleadings there lies no claim against the Second Defendant, it is not pleaded that the Second Defendant is a member of the First Defendant to support the construction the Plaintiffs contended, nor is any contractual basis upon which the Second Defendant is liable as an agent, pleaded.
- [16] For these reasons the first ground of exception is be upheld.
- [17] In the second ground of exception the Defendants contend that the Plaintiffs seek to hold the Defendants liable for a term not agreed to in the building agreement i.e. the failure to supply approval from NHBRC and the local authority for both phases1 and 2. The Defendants contend that for this reason the particulars of claim lacks averments necessary to sustain a cause of action.,
- [18] The Plaintiffs contend that the building agreement was drafted by the Defendants and as such cannot rely on defects in the contract that they themselves drafted, relying on the *contra preferentem* rule. The Plaintiffs contend that it must be construed against the Defendants that the obligation to provide the approvals must be supplied and based their submission on what the court stated in the case of *Kliptown Clothing Industries Pty Ltd*¹⁴
- “if the meaning of a word or clause in an insurance contract is not clear, or the word or clause is ambiguous, the verba fortius accipiuntur contra*

¹³ 2002 (2) SA 514 (W)

¹⁴ 1961 (1) SA 103 (AD)

proferentem rule is applicable. This rule requires a written document to be construed against the person who drafted it."

- [19] This Court had regard to paragraph 5 of the particulars of claim, which contain the offending paragraph 5.1.2 as one of five sub-paragraphs under paragraph 5. Paragraph 5 deal with non-performance by the First Defendant which is expressly provided for in the building contract. Having regard to paragraph 5 as a whole, the Defendants failed to show that it lacks averments necessary to sustain a cause of action.
- [20] For these reasons the second exception is dismissed.
- [21] The third ground of exception is based on the ground that the building contract lacks time periods and dates by which the various phases of the building works must be completed or that it must be completed within a reasonable time and therefore the defaulting party is not in *mora* as no notice to perform by a determined or determinable date was given.
- [22] The Defendants submit that in the circumstances *mora* being a prerequisite before damages can be claimed, the Plaintiff's failed to allege they have provided notice of default.
- [23] The Plaintiffs submitted that the Defendants are relying on a defect that they themselves created in the contract as authors of the contract, which is legally impermissible by virtue of the *contra proferentem rule*.
- [24] It is indeed settled law that the principle of *contra proferentem rule* must fall on the excipients, by construing the terms of the contract against the excipients, as the Supreme Court of Appeal has in the case of Cape Group Construction Pty Ltd t/a Forbes Waterproofing v Government of the United Kingdom¹⁵ held that the *contra proferentem rule* provides that if there is any doubt about the

¹⁵ [2003] 3 All SA496 (SCA) (23 May 2003)

meaning or scope of an exclusion clause, the ambiguity should be resolved against the party seeking to rely on the exclusion clause.

- [25] The Defendants failed to show that there is a lack of averments necessary to sustain a cause of action, having regard to the particulars of claim.

- [26] For these reasons, the third ground of exception is dismissed.

- [27] The fourth ground of exception is based on the Plaintiffs failing to allege in their particulars of claim whether they seek an order for specific performance or an order for cancellation of the building contract.

- [28] The Plaintiffs submitted in opposition, that in so far as the building agreement makes no provision for cancellation, such an interpretation must be construed against the Defendants as drafters of the building agreement on the basis of the *contra preferentem rule*.

- [29] The Plaintiffs further submitted that they exercised their election when summons was issued and moved the court for cancellation without an order for specific performance.

- [30] Bradfield¹⁶ pens that where cancellation notice did not precede the summons, the issuing of summons claiming damages will imply notice of cancellation¹⁷ and imply cancellation, unless the contract prescribes a particular procedure such as notice as was stated in the case of *Shrosbree v Simon*¹⁸. It is evident from the pleadings that the Plaintiffs herein exercised an election to cancel the agreement and signal such cancellation by issuing of summons.

- [31] In my view, having regard to the authorities mentioned herein, there is no merit in the fourth ground of the exception, therefore the fourth ground of exception is dismissed.

¹⁶ Christie's Law of Contract in South Africa, 7th Edition 2016 page 637

¹⁷ Du Plessis v Government of Namibia 1994 NR 227- 229G-H

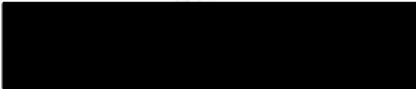
¹⁸ 1999 488 (SE) 492 D-I

- [32] The parties extensively addressed Court on the costs orders they seek. The award of an appropriate cost order falls pre-eminently within the discretion of the Court, which discretion should be applied judicially taking into consideration all the facts. The Court also had regard to the postponement of the exception for later hearing and the submissions that were made in that regard.
- [33] The Defendants were partially successful in the exception in that the exception based on ground one was upheld, while the Plaintiffs were successful in that the exceptions based on grounds 2, 3 and 4 were dismissed. The Court is of the view that the most appropriate cost order in the circumstances, is that each party pays their own costs.

ORDER

- [34] Consequently the following order is made:

- 34.1 The first ground of exception is upheld;
- 34.2 The second, third and fourth grounds of exception in terms of the said notice of exception are dismissed;
- 34.3 The Plaintiffs are granted leave to amend their pleading within 10 court days of the date of this order.
- 34.4 Each party is to pay their own costs.


M.T. JORDAAN
ACTING JUDGE OF THE HIGH COURT, BLOEMFONTEIN

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