

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: YES / NO
 (2) OF INTEREST TO OTHER JUDGES: YES / NO
 (3) REVISED:

22 September 2023
 DATE

SIGNATURE

CASE NO: 2022/11004

In the matter between:

PCS GLOBAL (PTY) LTD

Plaintiff/Respondent

and

EKKEHARD WALTER MOISEL

1st Defendant/1st Excipient

BIRGET CRONAU

2nd Defendant/2nd Respondent

JUDGMENT

(The matter was heard in open court, but the judgment was delivered electronically by uploading onto CaseLines to the electronic file of this matter. It was electronically submitted to the parties/their representatives on CaseLines)

[1] The defendants, as excipients, delivered an exception towards the particulars of claim of the plaintiff (the respondent in the exception). There will be referred to the parties as in the main action.

[2] The exception delivered by the first defendant contains seven (7) grounds of exception and that of the second defendant three grounds of exception. The second defendant's grounds of exception are verbatim the same as the first, second and fifth grounds of exception raised by the first defendant.

[3] The grounds of exception can be divided into two categories: to wit (1) grounds one to four are in respect of claims 1, 2, 3 & 6; based on averments that these four claims were extinguished by prescription in that a period of more than three years lapsed from the date that the claims arose; and (2) the grounds five to seven are directed towards the particulars of claim as a whole, the defendants contending that the particulars of claim are vague and embarrassing. The respondents claim that the incompleteness of the particulars of claim seriously prejudices the defendants arising from a lack of particularity.

[4] The defendants correctly stated that the *onus* is on the defendants to show both vagueness and embarrassment, the embarrassment resulting on prejudice.

DIFFERENCE BETWEEN SPECIAL PLEA AND EXCEPTION:

[5] Uniform Rule 22 deals with a plea while Rule 23 deals with exceptions. Rule 18 deals with pleadings in general and in particular what a plaintiff needs to include in any particulars of claim. The gist is that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies

for his/her claim, defence or answer to any pleading, with such sufficient particularity to enable the opposite party to reply thereto.

[6] The gist is that the pleader should plea *facta probanda* (the facts that had to be proved) and not also the *factia probantia* (the facts that would prove such facts). See Erasmus, *Superior Court Practice* 2nd ed vol 2 D1-232B. ("Erasmus"). On the importance of the distinction see Erasmus D1-232B footnote 3; *Nasionale Aartappelraad Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T) par 797 G-H and *Deltamine (Pty) Ltd v Tiger Brands Ltd* [2002] 2 All SA 26 SCA par [25].

[7] In *Jowell v Bramwell-Jones* 1998 (1) SA 836 W at 899G it was held that an exception averring that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action; it goes to the whole cause of action which must be demonstrated to be vague and embarrassing.

[8] An exception can also be taken to particular sections of a pleading provided that they are self-contained and amount in themselves to a separate claim or defence. Erasmus *supra* D1-297.

[9] When an exception is successfully raised as in Rule 23, the court would normally grant the opposite party time to correct the complaint(s) raised in the exception, but the opposing party does not have the "luxury" to reply to the exception raised, while when a special plea is delivered, the recipient has the right to reply thereto in a replication or similar pleading. It is further not necessary to obtain the consent of the court to reply to a special plea provided not being formally barred.

[10] It is trite law that prescription is a defence raised by a defendant against a claim instituted against him by a plaintiff and this is normally done in a special

plea. The court cannot on its own take notice of prescription (section 17 of the Prescription Act, 68 of 1969- *“a party who invokes prescription shall do so in a relevant document filed of record in the proceedings”*, a special plea.

[11] There are several cases where the issue was discussed whether such complaint be raised in a special plea or by way of exception. In **Sanan v Eskom 2010 (6) SA 638 (GSJ)** the court was confronted with an exception to particulars of claim with regard to prescription and not in a special plea. It held in (par [20] that prescription should be raised in a special plea and not in an exception, but concluded that *“it seems to be incongruous that a party is obliged to raise a defence in a particular way in order to accommodate or assist his opponent in raising a counter argument to such defence”*. The court of same division in **Living Hands (Pty) Ltd v Ditz 2013 (2) SA 368 (GSJ) T at 391C-393E** held that prescription may not be raised by way of exception as opposed to a special plea.

[12] In **Habib v Ethekwini Municipality 2020 (1) SA 280 (KZN)** it was held that if prescription was raised by means of exception, the exception did not constitute an irregular step. The court held in par [16] and [19] *“that if so confronted, it should examine whether the particulars of claim are indeed excipiable, in other words, whether the particulars of claim contained insufficient averments to sustain a cause of action”*. The court continued and held in par [16] *“that an exception based on prescription will usually fail because the contention that the particulars of claim lack the averments necessary to sustain an action is incorrect. This is because the plaintiff is not required to aver that his action has not become prescribed”*. This conclusion was confirmed in **Jugwanth infra**.

[13] In **Jugwanth v Mobile Telephone Networks (Pty) Ltd [2021] 4 All SA 346 (SCA)** the Supreme Court of Appeal set aside a High Court order of allowing an exception be raised where the complaint was prescription. The SCA in particular held that the defendant’s reliance in the **Habib case** as justification

for reliance on an exception where prescription was raised was incorrect with the conclusion of the court in **Habib**.

[14] The SCA in **Jugwanth** made an in depth inquiry into this question and came to the conclusion that prescription was a defence to be raised in a special plea. The SCA held that it was not necessary for a plaintiff to anticipate the invocation of prescription and plead a basis on which the claim had not prescribed in its particulars of claim (**Jugwanth par [10]**).

[15] The SCA in **Jugwanth** further held that the submission by the excipient that the delivery of an exception raising prescription would require a plaintiff to amend its particulars of claim to plead a basis on which the claim had not prescribed, had to be rejected; could simply not be the case because it would lead to that an exception to otherwise sufficient particulars of claim required a plaintiff to amend on pain of the exception being upheld and the claim being dismissed if a plaintiff need not have anticipated prescription being raised in order for the particulars of claim to disclose a cause of action. **Jugwanth par [17]** and **Erasmus D1-284-285**.

[16] It is further trite that a party alleging prescription must allege and prove the date on which the other party acquired knowledge of the identity of the debtors and the facts and date on which the creditor (plaintiff here) required the necessary knowledge from which the debt arose.

[17] A debt is not deemed due until the creditor (plaintiff here) has knowledge of the identity of the debtor and the facts giving rise to the debt. A creditor who could exercise reasonable care in this regard is deemed to have the necessary knowledge. **Abrahamse v East London Municipality: East London Municipality v Abrahamse 1997 (4) SA 613 SCA**. There is no such averment by the defendants before the court to infer reasonable knowledge on the side of the plaintiff.

[18]The debtor (defendants here) may in the alternative allege and prove the date on which the plaintiff, with the exercising of reasonable care, should be deemed to have acquired the relevant knowledge resulting in prescription successfully raised. **Gericke v Sack 1978 (1) SA 821 A** and **Drennan Maud and Partners v Town Board of the Township of Pennington 1998 (3) SA 200 SCA**. There are no averments of kind from the defendants in this regard.

[19] I am of the view that the exception with regard to prescription cannot succeed and it is dismissed. The costs aspect will be dealt with below.

EXCEPTION: VAGUE AND EMBARRASSING:

[20] When the exception raised by the defendants with regard to the fifth to seventh grounds are scrutinised, it is clear that the defendants attack specific paragraphs in the particulars of claim to be vague and embarrassing, and not the whole cause of action as set out in **Jowell supra**. This cannot be done.

[21] Having read the particulars of claim and the objections raised by the defendants, I am of the view that the defendants failed to raise any ground in this regard. The defendants further failed to allege and prove any prejudice on their behalf. The particulars of claim in my view are clear and carry the necessary averments to sustain a cause of action to enable the defendants to plead thereto.

[22] When reading the particulars of claim it is clear what the plaintiff avers the defendants did wrong: the first defendant as managing director of the plaintiff, allegedly abused his position of trust and made certain payments towards the second defendant's banking account. The particulars of claim are direct to the point what allegedly transpired. The annexures are clear when and the amounts transferred to the account of the second defendant. Both were

allegedly in a position of trust and all that they need is to plea to the particulars of claim. I am satisfied that the averments made complies with the conciseness required in Rule 18, with the necessary averments to sustain a cause of action. There is nothing vague or embarrassing in the particulars of claim in my view warranting any success with the exceptions.

[23] The initial exceptions were without any prayers and the afterthought to file what purports to be an attempt to cure this defect is without substance. These second documents do not purport to be amendments to the initial exceptions filed.

CONCLUSION:

[24] I am of the view that the exceptions do not pass the test in Rule 23 and there is no reasonable prospect to success in this regard.

ORDER:

[24] The exceptions are dismissed with costs. I am not convinced that it amounts to an abuse of process and there is no reason for a punitive cost order. The cost order is on a party and party scale.



J HOLLAND-MUTER

JUDGE OF THE PRETORIA HIGH COURT

Matter heard on 27 July 2023.

Judgement delivered on 20 September 2023

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