

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 22837/2022

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

11 October 2023
Date


Signature

In the matter between:

NEVILLES TOURS AND LOGISTICS (PTY) LTD

Plaintiff

and

INTERCAPE FERREIRA MAINLINER (PTY) LTD

Defendant

Heard: 14 April 2023

Judgment: 11 October 2023

JUDGMENT

Introduction

1. This matter, at core, concerns the sustainability of an exception taken by the defendant to the plaintiff's particulars of claim.

2. The matter, unfortunately, has a messy history and there are several ancillary issues which have arisen in respect of the exception, which require resolution prior to addressing, and so as to ascertain, the content of the exception.
3. After the plaintiff delivered a notice of bar on 7 November 2022, the defendant delivered a "no-cause-of-action" exception on four grounds on 14 November 2022.
4. On 1 February 2023, the plaintiff brought an interlocutory application, seeking that the exception be struck out on the basis of a want of prosecution ("**the striking out application**").
5. This prompted the defendant to bring a rule 30 notice on 16 February 2023 ("**the rule 30 notice**"), contending, essentially, that the application to strike out could not be brought at that stage as the plaintiff first had to apply to compel the defendant to deliver its heads of argument. The rule 30 notice required the plaintiff to remove the cause of complaint within 10 days. That was not done, but this does not seem to have been followed by any rule 30 application on the part of the defendant.
6. The striking out application was, however, opposed (albeit belatedly), with answering papers delivered by the defendant shortly before the hearing, on 6 April 2023.
7. Also on 6 April 2023, the defendant delivered a notice of intention to amend its exception, by adding five new grounds of exception. When this was opposed by the plaintiff on 10 April 2023, the defendant delivered a formal application for amendment of the exception on 12 April 2023 ("**the amendment application**"), seeking that it be set down to be heard at the same time that the exception was heard. That application was not supported by any affidavit.
8. The exception was set down and heard on 14 April 2023.

9. The parties were at loggerheads as to what was before me and what I should be adjudicating. Each party pressed me to hear and decide the respective interlocutory process/es which such party had launched.
10. As will be apparent from the above, the process in arriving at the hearing of the exception has been unnecessarily protracted. Not only is the multiplicity of interlocutory applications unfortunate, but they were also not properly set down in accordance with the rules, practice manual and directives applicable in this Division.
11. I have decided to deal with this matter practically, while also ensuring that the parties are not unduly prejudiced by the errant actions of the other.
12. I shall deal first with the interlocutory applications, and then address the exception, which is at the heart of the issues between the parties in this case.

Interlocutory applications

13. An exception is a pleading delivered by party A, attacking the very basis of the claim or defence advanced by party B, either because such claim or defence is unsustainable in law based on the pleaded facts or because it is so ambiguous or uncertain that it is not reasonably possible for party B to plead thereto without being substantially prejudiced.
14. In this case, and within the time permitted by the Uniform Rules, the defendant delivered an exception on the basis of the first of the above bases.
15. Exceptions in this division are, in general, enrolled on the opposed motion roll, and thus the procedures relating to enrolments in that court are applicable. This includes the requirement on the part of the defendant as excipient to deliver an index, a practice note and heads of argument.

16. The defendant did not do so within the time stipulated in the practice directions and practice manual of this Court. It appears to be common cause that in terms of the relevant legal requirements, the defendant had to serve its heads of argument by early December 2022. The defendant only served its heads of argument on 15 February 2023.
17. The plaintiff mounts a two-pronged attack on this. It contends first that the late delivery of the heads renders the exception null and void. It relies in this regard on case law to the effect that the delivery of a pleading, including an exception, after the expiry of the bar in terms of rule 26 is impermissible and is a nullity. Second, the plaintiff contends that the defendant has failed, in a wilful and mala fide fashion, to prosecute the exception. This contention is grounded in the fact that (i) the defendant is said to have disregarded the rules by failing to adhere to the time periods prescribed therein or indeed the deadlines that the defendant set for itself and the deadlines set by the plaintiff; (ii) the defendant is seeking to frustrate the plaintiff's access to court; and (iii) the defendant's excuses for failing to adhere to the prescribed time periods are unsustainable. Essentially, the defendant contends that its legal team has had a heavy workload and that the December/January holiday period had intervened.
18. On the above bases, the plaintiff contends that the exception should be struck out or set aside.
19. While I have sympathy with the contention that the defendant has taken an extended and possibly even inordinate period to take the next steps in the litigation, in terms of the practice directives of this Division, the plaintiff's remedy is to deliver its heads of argument (and related documents) and then apply simultaneously (i) to compel delivery of the heads of argument (and related documents) by the defendant; and (ii) for a date for the hearing of the exception on the merits. Its principal remedy is not to apply to strike out the exception. While I do not exclude the possibility that the plaintiff may make the latter

application, this would be in the exceptional circumstances where there has been a clear abuse of process or the defendant truly does not evince an intention to prosecute its legal process. I do not think that the evidence presented by the plaintiff in this regard rises anywhere near the requirement of a material abuse of process or an intention not to proceed with the exception. While the defendant's explanations are not perfect, they do explain the delay, which in any event on its face is not so extensive, reckless or egregious as to constitute an abuse of process. If the plaintiff was anxious to progress the matter, it is unclear why it did not take the next step (as outlined above)

20. In my view, therefore, there is no merit in the striking out application.

21. The amendment application was opposed by the plaintiff. It contended that it was prejudiced by the belated and unexplained nature of the proposed amendments.

22. The principles governing amendments to pleadings have been usefully summarised recently as follows:

22.1 *"The court has a discretion whether to grant or refuse an amendment.*

22.2 *An amendment cannot be granted for the mere asking; some explanation must be offered therefor.*

22.3 *The applicant must show that prima facie the amendment has something deserving of consideration, a triable issue.*

22.4 *The modern tendency lies in favour of an amendment if such facilitates the proper ventilation of the disputes between the parties.*

22.5 *The party seeking the amendment must not be mala fide.*

- 22.6 *The amendment must not cause an injustice to the other side which cannot be compensated by costs.*
- 22.7 *The amendment should not be refused simply to punish the applicant for neglect.*
- 22.8 *A mere loss of the opportunity of gaining time is no reason, in itself, for refusing the application.*
- 22.9 *If the amendment is not sought timeously, some reason must be given for the delay."*¹
23. A party seeking an amendment to its pleadings must set out a case in its founding papers which allows the other parties to the suit and the Court to interrogate whether a case has been made out in light of the above principles and requirements. The defendant has not delivered an affidavit at all and has laid no basis for the relief it seeks. An amendment to pleadings is not there for the asking. A substantive case has to be made on affidavit, particularly given the belated nature of this amendment. Such an amendment is by its nature prejudicial to the plaintiff, given that it is raised at a late stage, entails a curtailment of its procedural rights under the practice directions of this Court (in terms of filings and the like) and makes a material difference to the case it has to meet. Without so much as an attempt at an explanation for the delay and the reason for the content and timing of the proposed amendment, the amendment application is stillborn.
24. In my view, given the above manifest deficiencies, the amendment application falls to be dismissed.

The exception

25. I thus proceed to consider the exception based on its original, four grounds.

¹ *Van Dyk N.O. and Others v Minister of Public Works and Another* (1967/20) [2022] ZANHC 28 (20 May 2022), para [4].

26. It is important at the onset to note that all four grounds are advanced to contend that the plaintiff's claim is bad in law, and not that the particulars of claim are vague and the defendant will be prejudiced in pleading thereto. The defendant alleges that as a result of the deficiencies which it has identified, the particulars do not disclose a cause of action. This is the prism through which this matter must be adjudicated.

Applicable legal principles

27. In a cause of action exception, the following principles are applicable:

*"In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided."*²

28. Moreover, *"[m]inor blemishes are irrelevant: pleadings must be read as a whole; no paragraph can be read in isolation. 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. Only facts need be pleaded; conclusions of law need not pleaded."*³

² Pretorius and Another v Transport Pension Fund and Another 2019 (2) SA 37 (CC), para [15].

³ Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 902-903.

Defendant's grounds of exception

29. The first ground of exception relied upon by the defendant is that while the defendant relies on a partly written agreement in paragraph 10 of its particulars of claim, it does not plead when, where and by whom the agreement was concluded or its terms. Essentially, the defendant avers that the plaintiff has failed to comply with some of the pleading requirements in respect of contracts as set forth in rule 18(6). The defendant thus asserts that the pleading fails to disclose a cause of action.
30. The second ground of exception is that similar details are missing in respect of the oral, tacit and implied contract relied upon in paragraph 10 of the particulars.
31. The third ground of exception attacks the plaintiff's averment that the "agreement" was cancelled. The defendant complains that it is unclear what agreement was cancelled and when the cancellation took place.
32. The fourth ground of exception seeks to impugn allegations in the particulars of claim to the effect that the Consumer Protection Act, 2008 ("**CPA**"), are "*applicable to cancel the sale agreement and should supersede the partly written and oral agreements*". The defendant complains that the pleading by the plaintiff does not set forth what sections of the CPA are relied upon and what the new terms are that would supersede the existing agreements.

Plaintiff's response

33. The plaintiff alleges that the defendant is mistaken in its grounds of exception, which are all based on a contractual cause of action. In fact, however, the plaintiff does not pursue a case in contract, but only in delict.

34. The plaintiff also avers that the alleged missing details are either unnecessary or are already provided in different parts of the particulars of claim.
35. The plaintiff also asserts that the defendant's complaints do not mean that there is no cause of action and the alleged non-compliances are minor and substantively irrelevant in this case.

Analysis

36. The plaintiff's particulars are not a model of clarity. They are in parts unclear and appear to be ambiguous in various respects. They would certainly benefit from a rework. I refrain from opining whether they may be sufficiently vague and prejudicial to found a vague and embarrassing exception.
37. The crisp question currently is whether the Court can conclude that on no reasonable interpretation of the particulars do they disclose a cause of action, based on the complaints advanced by the defendant. I do not think that the complaints raised illustrate that the particulars do not make out any cause of action. Insofar as certain aspects of the pleaded cause of action were unclear, this is a matter to be resolved by way of a vague and embarrassing exception, a complaint that the rules of court (such as rule 18) may not have been complied with, and a request for further particulars in due course. It is not the domain of a cause of action exception, save in those cases where there is a failure to plead an essential element which renders the cause of action inchoate.
38. The difficulties with the defendant's case on exception may be summarised as follows.
39. The complaints it raises seem to go not so much to cause of action, but rather uncertainty and possible prejudice occasioned by the wording used, or non-compliance with rules of court concerning pleadings.

40. This applies to each of the complaints raised. But the defendant did not raise a vague and embarrassing exception: only one based on cause of action.
41. The failure to stipulate precisely who acted on behalf of the plaintiff and defendant or where and when the contract in question was concluded does not detract from the fact that a contract has been pleaded. In any event, when the pleading is read as a whole, it contains the dates on which the negotiations for the agreements are alleged to have taken place and the identity of the representatives of the parties involved in the negotiations. The representations and warranties made by the defendant to the plaintiff have also been pleaded, in paragraphs 8, 9 and 10.2 of the particulars of claim. Although these are not pleaded in the clearest of terms, they essentially comprise the following: that the coach in question was in good working order, passed a roadworthy test, and could travel long distances with ease.
42. The key tenets of the case may be ascertained from reading the pleading as a whole, which is what I am required to do in an exception. Read in this fashion, it is apparent that this matter concerns a sales contract (comprising written, oral/tacit/implied agreements between the parties) alleged to have been concluded between the plaintiff and the defendant for the sale of a coach which was capable of achieving certain performance targets and was in a usable and roadworthy state. The plaintiff alleges that it turns out that the coach delivered had a variety of defects and deficiencies of which the defendant was aware but which were not (and should have been) disclosed to the plaintiff and which were contrary to the representations and warranties which underlay the contract in question. The plaintiff alleges that the misrepresentations and actionable omissions were deliberate and fraudulent. There is also an allegation in the alternative that the defendant had a duty of care in law to be honest in respect of any defects which were known to it and disclose any information concerning these aspects to the plaintiff. On these various bases

(fraudulent or deliberate misrepresentation inducing a contract and dishonest non-disclosure), the plaintiff purported to resile from the contract in question and confirms that rescission in the particulars of claim. In my view, the specific date for the rescission is key to the cause of action, so long as it has taken place at the time when the action is instituted.

43. In respect of the CPA allegations, it is true that there is uncertainty around the precise sections of the statute on which reliance is placed to enable the plaintiff to resile from the agreement(s) in question, but again this is not a cause of action complaint, but rather may found a vagueness and embarrassment claim or a request for particularity. Neither of these has been pursued by the defendant.
44. It should also be noted that the plaintiff has made clear on oath and in its submissions that its claim for damages is founded squarely in delict, not contract. Reading the pleading as a whole and while there are many imperfections in the formulation of the claim, it is reasonably possible to give that construction to the particulars and a case in delict based on fraudulent misrepresentation and dishonest non-disclosure, with a concomitant restitutionary and compensatory damages claim, is pleaded. Of course, whether a delictual claim is good on the facts or whether there was a legal duty in delict which can co-exist with the pleaded contract is not something which I need to decide now, and was not the basis of the exception.
45. In all the circumstances, the exception on the bases relied by the defendant falls to be dismissed.

Costs

46. What remains is the issue of costs. In my view, there are no circumstances which warrant a deviation from the general rule that costs follow the event, in relation to the interlocutory applications and the exception.

Order

47. In the circumstances, I make the following order:

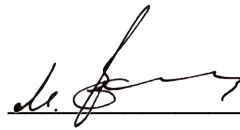
47.1 the striking out application is dismissed with costs;

47.2 the amendment application is dismissed with costs;

47.3 the exception is dismissed with costs.

Hand-down and date of judgment

48. This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand down of the judgment are deemed to be 9:30 on 11 October 2023.



VM MOVSHOVICH

ACTING JUDGE OF THE HIGH COURT

Plaintiff's Counsel: MR Maphutha

Plaintiff's Attorneys: Motseto Incorporated

Defendant's Counsel: SG Maritz

Defendant's Attorneys: Tiaan Smuts Attorneys

Date of Hearing: 14 April 2023

Date of Judgment: 11 October 2023