



IN THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE.

CASE NO: 746/2018

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED: _____
DATE:	<u>29/11/2022</u>
SIGNATURE:	<u>LITHOLE AJ</u>

In the matter between:

SMALL ENTERPRISE AGENCY (SOC)LIMITED : PLAINTIFF

AND

TSOSHANG TRAINING CENTER CC :1ST DEFENDANT

SELWALENKWE ANTHOINETTE MESENYA :2ND DEFENDANT

JUDGMENT

This judgment was handed down electronically by circulation to

the parties' legal representatives by email. The date and time for handing down shall be deemed to be the 29 November 2022.

LITHOLE AJ:

1. The Small Enterprise Finance Agency (Soc) Limited, the plaintiff, has instituted a claim against Tsoshang Training Centre CC and Selwalenkwe Anthoinette Masenya, the defendants, seeking an order for the payment of an amount of R5 236 586,86. The plaintiff action was preceeded by letter of demand in which the plaintiff had claimed an amount of R5 395 231,52.
2. The defendant raised an exception to the particulars of claim filed. It is common cause that the defendant afforded the plaintiff an opportunity to remove the cause of complaint, which invitation was not heeded, hence the adjudication of this exception.

Factual Matrix

3. The plaintiff is a state owned company with limited liability with registration number 1995/011258/06, with its principal place of business situated at Eco fusion5, Block D,1004 Teak Close. The plaintiff is a registered credit provider in terms of National Credit Act No. 34 of 2005 (the Act).

4. The first defendant is a close corporation registered in terms of Close Corporation Act 69 of 1984 with the registration number 2000/075724/23 with its chosen domicilium et executandi situated at 34 Lottering Street, Bendor Park, Polokwane in Limpopo province.
5. Second defendant is an adult female and sole member of the first defendant, employed as Insurance Adviser at PSG Wealth and Insure, at Lephalale.
6. The plaintiff and the defendant concluded a loan agreement. The plaintiff lent and advanced to defendant the capital amount of R4 969 499,24(four million, nine hundred and sixty nine thousands four hundred and ninety nine rand twenty four cents),including the facility fee .The loan was for period not exceeding 10 months from the date on which the loan amount or part thereof was advanced to the first defendant.
7. The plaintiff issued summons in January 2018 and served on the defendant. Instead of filing the plea the defendant raised an exception thereto to the particulars of claim. The plaintiff amended its particulars of claim and filed the amended particulars of claims.
8. Again instead of pleading to the amended particulars of claim ,the defendant raised yet another exception to the amended particulars of claims which is now the subject issue in this application.

9. The exception is in terms of Rule 23(1) of the Uniform Rules of Court.

10. Rule 23(1) provides that:

"where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of sub-rule (5) of Rule (6) provided that:

where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity for removing the cause of complaint within 15 days: provided further that the party accepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.

11. The trite principle of law is that an exception is determined solely on the averments as pleaded in the particulars of claim. The approach is that, the averments in the particulars of claim must be construed by the Court as true. No extraneous factors are permitted in the determination of the exception.

12. The defendants have excepted to the particulars of claim on the basis that they are vague and embarrassing, raising the following grounds:

12.1 non-compliance with the Rules relating to pleadings (rule 18 of the uniform rules)

12.2 applicability of the NCA.

12.3 Non-compliance with Rule 4 (irregular service)

13. Both parties are *ad idem* on the legal test for exception.
14. Before dealing with the grounds of exception raised by the defendant, I find it important to first deal with the delay in filing this exception. The plaintiff amended its particulars of claim and served the particulars of claim on the 03 May 2018. The defendant raised an exception and filed notice in terms of rule 23(1) on the 19 July 2021. The defendant failed to file plea for two years after the amended particulars of claims. They were placed under bar. Instead of filing the application for removal of the bar they decided to file the exception and the plaintiff did not raise irregular step to the exception filed.
15. The plaintiff only raised it in the heads of argument that the exception was filed two years after the amended plea was filed and they are under bar.
16. In the strict reading of Amended Rule 23(1), a party is given 10 days from receipt of the particulars of claim to serve his rule 23(1)(a) notice. The period given to the defendant to serve such a notice is the same as the period given to him to file his notice of intention to defend. The exception is therefore an irregular step and can be set aside. The court refers to **Hill NO and Another v Brown (3069/20) [2020] ZAWCHC 61 (3 July 2020)**, Roger J states the following: -

"[11] The amended rule is unambiguous. In practice, sensible plaintiffs are unlikely to object to a rule 23(1)(a) notice delivered a few days later than the strict limit imposed by the amended rule, but for present purposes the important point is that the framers of the rules plainly did not intend

that a defendant should have a leisurely period to assess whether or not particulars of claim are vague and embarrassing. In the circumstances, a defendant can hardly complain if, after the expiry of the 20-day period allowed for a plea or exception, his opponent delivers a notice of bar having the effect of making the subsequent service of rule 23(1)(a) notice irregular. In such a case, a rule 23(1)(a) served after delivery of the notice of bar would, ex hypothesi, be at least 20 days out of time”.

17. The court has a discretion whether or not to set aside an irregular step, and the presence or absence of prejudice is usually decisive. In my view, the plaintiff will clearly be prejudiced if the rule 23(1)(a) notice is allowed to stand. The defendant, as appears from his attorney's heads of argument, considers that the notice is valid, from which it would follow that on the defendant's view he would be entitled to file an exception if the plaintiff fails to remove the alleged causes of complaint.
18. On a proper construction of the rules, however, the defendant has not filed a proper response to the notice of bar and should now be under bar. If the irregularity of the rule 23(1)(a) notice is confirmed by this court and the notice set aside, the parties will know where they stand. The defendant, if he wishes to oppose the case, will have to apply in terms of rule 27 to have the bar lifted and will need to show good cause. Whether or not the defendant will be able to show good cause is not something on which I can form an opinion, because I do not know what facts the defendant will advance in support of a rule 27 application if it was to be brought.
19. The court ultimately have to deal with exception since it cannot mero motu raise irregular step when it was not raised by the plaintiff.

20. In order to establish the basis of this exception and if this exception is sustainable, each ground should be dealt with separately.

Analysis

First ground: non-compliance with the Rules relating to pleadings (Rule 18 of the Uniform Rules).

21. The defendant contend that the plaintiff is alleging the breach of loan agreement in that the defendant failed to make payments in terms of loan agreement but fails to state the particulars of the alleged breach of the loan agreement including the date on which the breach was committed. further that the amount claimed in the letter of demand, account statement and certificate of balance do not correspond.
22. The plaintiff contend that the issue was addressed by filing the amended particulars of claim which were ignored by the defendant. This complaint is not speaking to the particulars of claim as amended.
23. In ***Trope South African Reserve Bank 1992 (2) SA 208 T at 221 A-E*** the Court held that the ultimate test is still whether the pleading complies with the requirements of Rule 18(4). The hard and fast rule relating to Exceptions is further that, in order for an Exception to succeed, the pleading must be excipiable on each and every possible interpretation that can be reasonably attached to it.

24. A pleading may be vague if it fails to provide the degree of detail necessary in a particular case properly to inform the other party of the case being advanced. The typical prejudice which justifies an exception is if the allegations in the particulars of claim are such that the Defendant is unable to plead properly. In order to answer this question, the Court is "*obliged to undertake a quantitative analysis of such embarrassment as the Excipient can show is caused to him, in his efforts to plead to the offending paragraph, by the vagueness complained of*".

25. The evaluation of prejudice is a factual enquiry, and is a question of degree. The decision must necessarily be influenced by the nature of the allegations, their content, the nature of the claim and the relationship between the parties. The defendant in this matter is not showing that after the amendment the confusion on the amount claimed in the amended particulars of claim, letter of demand and certificate of balance still exist. From the exception the confusion is based on the particulars of claim and nothing is said about the amended particulars of claim.

26. The onus is on the Excipient to show the prejudice and must do so within the ambit of the pleadings. In ***Nxumalo v First Link Insurance Brokers (Pty) Ltd 2003 (2) SA (620)*** the Court held as follows: "*The onus is of course on the excipient to show both vagueness amounting to embarrassment and to embarrassment*". *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 268F; *Quinlan v McGregor* 1960(4)SA383(D)at393E–H. *Trope v South African*

Reserve Bank and Another and Two Other Cases 1992 (3) SA 208 (T) ²³ Picbel Groep Voorsorgfonds v Somerville, Sable Industries Ltd v Nash and Others, Mitchell Cotts Pension Fund and Another v Nedbank Ltd and Another , Datakor Pension Fund and Others v Wynne-Jones & Company Employee Benefits Consultants (Pty) Ltd and Others (2011/16213, 2011/16214, 2011/16215, 2011/16216) [2012] ZAGPJHC 48 (30 March 2012)

27. In the case of *Inzinger v Hofmeyer and others*(7575/2010) [2010] ZAGP JHC 104, it was said that:

"An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. It is not directed at a particular paragraph within a cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing. As was stated in Jowell v Bramwell-Jones and Others 1998 (1) SA 83(W) at 905 E-H:

"I must first ask whether the exception goes to the heart of the claim and, if so, whether it is embarrassing to the extent that the defendant does not know the claim he has to meet"

28. Vagueness amounting to embarrassment and embarrassment in turn resulting in the prejudice must be shown. Vagueness would invariably be caused by a defect for incompleteness in the formulation and is therefore not limited to an absence of the necessary allegations but also extends to the way in which it is formulated. An exception will not be allowed, even if it is vague and embarrassing unless the excipient will be seriously prejudiced if compelled to plead to the particulars against which the objection lies.

29. The nature and extent of exceptions based on the ground that a pleading is vague and embarrassing were duly considered by Mc Creath J in the matter of *Trope v South African Reserve Bank* and two others and cited with approval by Heher J in the matter of *Jowell v Bramwell-Jones* the court referred to the following principles pertaining to exceptions:

“(a) *Minor blemishes are irrelevant,*

- (a) *Pleadings must be read as a whole, no paragraph can be read in isolation;*
- (b) *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 of evidence,*
- (c) *Only facts need be pleaded, conclusions of law need not be pleaded,*
- (d) *Bound up with the last mentioned consideration is that certain allegations expressly made to carry with them implied allegation and the pleading must be so read:...*”

Second ground: applicability of the NCA.

30. The defendant contend that in the amended particulars of claim the plaintiff state that, it is a registered credit provider in terms of the NCA and that the loan thereunder. It is contended further that the plaintiff pleaded that the agreement falls outside the NCA. The plaintiff explained in a letter that it was an error to state that the agreement falls under the NCA but did not provide that

explanation in the summons. It submitted by the defendant that it is not clear whether the loan falls within or outside the NCA.

31. The defendant places reliance on McKenzie v Farmers 'Co- Operative Meat industries limited where the definition of cause of action ,adopted from Cook v Gill (L.R,8,c.P.107),was held that "... every fact which it would be necessary for the plaintiff to prove ,if traversed, in order to support his right to the judgement of the court.It does comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."
32. The plaintiff pleaded in its amended particulars and in its reply to rule 23(1) notice that the provisions of the NCA are not applicable because the consumer is juristic person with assets value or annual turnover exceeding the threshold value determined by the minister in terms of section 7(1) of the NCA.
33. Section 9(4) of the NCA provides that if the agreement is of a large amount as contemplated in section 9(4) of NCA, notwithstanding, the asset value or the annual turnover of the consumer, the NCA will not apply. The large agreement are stipulated in the NCA and *inter alia* are the following:
 - 33.1 mortgage agreement;
 - 33.2 any credit transaction except a pawn transaction or credit guarantee, and the principal debt under that transaction or guarantee fall at or above higher of the threshold established in terms of section 7 (1)(b).

34. The amount involved in this matter is above the threshold imposed by the Minister under section 7(1)(b) of the Act. The agreement in essence constitutes a large agreement. Clarity was also provided in the amended particulars of claims and in the reply to section 23 (1) notice. Based on the above there is no merit on this complaint.

Third ground: Non-compliance with rule 4 (irregular service).

35. The defendant contended that second defendant as surety chose her domicilium citandi et executandi address for all notices and process to be given or served pursuant to the deed of suretyship. The summons were not served upon the second defendant at the chosen domicilium address.
36. The plaintiff contend that lack of service as contemplated in rule 4 does not render the summons vague and embarrassing. Reliance is placed on the judgement by Meyer J in *Akshardam Pty Ltd v JSR 108 investment CC* [2019] ZAGPJHC where the court held that :

“the rules, set out procedural steps. They do not create substantive law. Insofar as the substantive law is concerned, the requirement is that person who is being sued should receive the notice of the fact that he is being sued by way of delivery to him of the relevant document initiating legal proceeding. If this purpose is achieved, then, albeit not in terms of the rules, there has been proper service. In essence the plaintiff contend that improper service is not what makes the pleading excusable. In deciding whether the pleading is vague and embarrassing, the question involves deciding whether the pleading is indeed vague in such a manner that it is not possible to distil from it a clear single meaning.”

37. In *Southernpoort Developments (Pty) Ltd v Transnet LTD* the court formulated the test on exceptions as follows:

- “1. *In order for an exception to succeed, the excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it*
2. *A charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation.*
3. *The Court should not look at a pleading ‘with a magnifying glass of too high power.’*
4. *The pleadings must be read as a whole; no paragraph can be read in isolation.*

In order to succeed with an exception, the excipient needs to satisfy the court that it would be seriously prejudiced in the event that the exception should not be upheld.”

38. An exception that a pleading is vague, or embarrassing will not be upheld unless the excipient will be seriously prejudiced. The excipient has a duty to persuade the court that the pleading is excipiable on any interpretation that can be attached to it. An exception 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. Such an exception strikes at the formulation of the cause of action and not its legal validity. An exception that the pleading is vague, and embarrassing will not be allowed unless

the excipient will be seriously prejudiced if the offending allegations were not expunged. The court has to consider as a test for vagueness whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning. The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.

39. This court does not find that the defendant was prejudiced due to the exceptions raised by the defendant.

Order

1. The following order is made:
- 1.1 The Defendant's exception is dismissed;
- 1.2 The defendant is to pay the costs including the cost of one counsel



**TC LITHOLE
ACTING JUDGE
LIMPOPO DIVISION OF THE HIGH COURT
POLOKWANE**

APPEARANCES

On behalf of the excipient/defendant:

with:

Mr S .M Ndobe

Instructed by:

Ndobe Inc .Attorneys

On behalf of the respondent/plaintiff: Adv M Tsele

Instructed by:

Nandi Bulabula Inc

DATE OF HEARING

: 18 AUGUST 2022

DATE OF JUDGMENT

: 29 November 2022