



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

Case No: 30511/2020

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

A handwritten signature in black ink, appearing to read "Molefe", is written over a light blue rectangular background.

.....25 JULY 2022.....

SIGNATURE

DATE

In the matter between:

WERNER STANDER DEVELOPMENT CC

APPLICANT

REG NO: 1999/004326/23

and

AQUACULTURE ENGINEERING

FIRST RESPONDENT

REG NO: 2013/029321/07

PETER ALFRED JANCEK

SECOND RESPONDENT

JUDGMENT

MOLEFE J

[1] The applicant (excipient) in this application excepts to the averments in the respondent's claim in reconvention on the basis that same is vague and embarrassing, alternatively that it lacks averments which are necessary to substantiate a cause of action.

[2] On 13 July 2020, the applicant (plaintiff in the main action) issued summons against the first and second respondents (first and second applicants in the main action) for payment of damages in the amount of R1 600 000.00 (one million six hundred thousand rand), in the alternative R2 100 000.00 (two million one hundred thousand rand) arising from the written agreement entitled "Memorandum of Agreement and Acknowledgment of Debt" ('the agreement') entered into between the plaintiff and the first defendant. The relevant material terms of the agreement were that the plaintiff would make available to the first defendant a finance facility of R1 600 000.00 (one million six hundred thousand rand) upon the signing of the agreement. The repayment of the finance facility would be carried out by the first and/or the second defendant facilitating the purchase of erven by the developer for a purchase price of R265 000.00 (two hundred and sixty-five thousand rand) of which R60 000.00 (sixty thousand rand) per erf would be the commission of the finance facility.

[3] On or about 1 January 2018, the second defendant in writing bound himself as surety and co-principal debtor with the first defendant for the due performance by the first defendant of all its obligations under the agreement.

[4] The plaintiff duly complied with its obligations in terms of the agreement and transferred the agreed amount of R1 600 000.00 (one million six hundred thousand rand) to the first defendant, and the first defendant is in breach of his contractual obligations.

[5] On 8 February, the first and second defendants filed a plea and a claim in reconvention against the plaintiff for payment of R5 000 000.00 (five million rand) made up of R2 500 000.00 (two million five hundred thousand rand) for lost income for work done due to cancellation of the contract; R800 000.00 (eight hundred

thousand rand) for earthworks and consultancy work and services done to the electrical installation; and R1 700 000.00 (one million seven hundred thousand rand) for general damages.

[6] For convenience the parties are referred to as in the main action.

[7] The plaintiff concluded that the claim in reconvention was excipiable, and on 23 February 2021 filed a notice in terms of rule 23 (1) of the Uniform Rules of Court, calling on the first and second defendants to remove the cause on the complaint. The plaintiff submitted that the defendants took no steps to address the complaints and the plaintiff accordingly noted an exception against the claim in reconvention.

[8] It is the defendants' argument that on 16 March 2021, the notice of intention to amend the defendant's counterclaim was served on the plaintiff's attorneys via email, and the plaintiff's attorneys informed the defendants that they were not accepting service by email. Reasons for not accepting email service was requested but none was provided. Subsequently the plaintiff launched this exception application against the defendant's claim in reconvention which is opposed by the defendant.

Legal Principles

[9] There are two types of exceptions; being an objection that a pleading is vague and embarrassing, and an objection that a pleading does not disclose a cause of action.¹ The two types of exceptions are adjudicated differently. The aim of exception procedure is to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost-effective manner.²

[10] An exception should be dealt with practically and sensibly. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of SA*, it was said that:

¹ Rule 23 of the Uniform Rules of Court.

² *Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A)* at 706.

“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 imaginary 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’”³

[11] An exception must of course be considered on the basis that the allegations of fact advance in the particulars of claim are regarded as correct and proved, and the particulars of claim have to be considered in totality.⁴ Regard should be had to the provisions of rule 18 (4) of the Uniform Rules of Court:

“Every pleading shall contain a clear and concise statement of the material facts upon which pleader relies for his claim... with sufficient particularity to enable the opposite party to reply thereto.”

[12] The general principles in interpreting pleadings were stated by Heher J in *Jowell v Bramwell- Jones & Others*:

“(a) minor blemishes are irrelevant:

(b) pleadings must be read as a whole; no paragraph can be read in isolation;

(c) a distinction must be made between *facta probanda*... and *facta probantia*...;

(d) only facts need to be pleaded; conclusions of law need not be pleaded;

(e) ...certain allegations expressly made may carry with them implied allegations and the pleadings must be so read.”⁵

[13] The pleader is required to state its case in a clear and logical manner so that the cause of action can be made out of the allegations stated. The material facts (*facta probanda*) should be pleaded, as opposed to the facts used to prove (*facta probantia*) such material facts, that is the evidence.⁶ The defendant must be persuaded the court that upon every reasonable interpretation the particulars of claim fail to disclose a

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

⁴ AB Ventures Ltd v Siemens Ltd 2011 (4) SA 614 (SCA) at para 2.

⁵ Jowell v Bramwell- Jones & Others 1998 (1) SA 836 (W) at 902 I-J and 903 A-B.

⁶ McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 (AD).

cause of action.⁷ The onus of showing that a pleading is excipiable rests on an excipient.⁸

[14] Objections that a pleading is vague and embarrassing should be adjudicated with reference to the principles referred to in *Jowell v Bramwell-Jones*:

- “(a) A pleader is merely required to plead a summary of material facts;
- (b) An attack on a pleading cannot be found on a mere lack particularity;
- (c) An expression that a pleading is vague and embarrassing strikes at the formulation of pleading and not at its validity;
- (d) An exception that a pleading is vague and embarrassing cannot be employed to strike out a particular paragraph, the exception must be directed at the whole cause of action which must be demonstrated to be vague and embarrassing.”

[15] The following guidelines on an exception that no cause of action is disclosed are provided in *Barclays National Bank Ltd v Thompson*:

“It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial: *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706. Save for exceptional cases, such as those where a defendant admits the plaintiff’s allegations but pleads that as a matter of law the plaintiff is entitled to relief claimed by him (cf *Welgemoed en Andere v Sauer* 1974 (4) SA 1 (A)). An exception to a plea should consequently also not be allowed unless if upheld, it would obviate the leading of ‘unnecessary evidence’.⁹

[16] The plaintiff’s grounds of exception should be considered and adjudicated against the backdrop of the above-mentioned principles.

First ground

[17] At paragraph 3.1 of the counterclaim the defendants alleged that the claim consists of ‘commission that would have been earned’ on the sale of certain

⁷ First National Bank of Southern Africa Ltd v Perry N.O. and Others 2001 (3) SA 960 (SCA) at 965D.

⁸ South African National Parks v Ras 2002 (2) SA 537 (C) at 542.

⁹ Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (A) at 553.

immovable properties. At paragraph 3.3 it is pleaded that the commission would have been calculated at R15 900.00 (fifteen thousand nine hundred rand) per stand and references to commission are repeated at paragraphs 3.5, 4.4 and 5.1.

[18] In accordance with section 16 of the Estate Agency Affairs Act, 112 of 1978 ('the EAA Act'), every estate agent shall apply in the prescribed form for a fidelity fund certificate. The plaintiff's counsel submitted that in accordance with section 34 A of the EAA Act, no person shall conduct the business of an estate agent or be entitled to commission from such business unless such person is the holder of a valid fidelity fund certificate, and an estate agent shall not be entitled to remuneration unless he/she is the holder of a valid fidelity fund certificate. The result is that, it is argued, the defendants have failed to plead a valid and enforceable cause of action.

Second ground

[19] The prayers at the end of the end of the counterclaim do not reflect any claims in respect of the commissions referred to in paragraphs 3.1, 3.3, 3.5, 4.4 and 5.1 of the counterclaim. The plaintiff's counsel submitted that as a result of the above, the plaintiff is left uncertain what the objective (purpose of the pleaded allegations are, and whether or not the pleaded allegations form part of the *facta probanda* of the defendant's claim in reconvention. It is submitted therefore that the claim in reconvention is vague and embarrassing.

Third ground

[20] Reference is made to a 'verbal agreement' in paragraph 3.3 of the counterclaim. The plaintiff's counsel submitted that the defendants have failed to comply with rule 18 (6) of the Uniform Rules of Court which provides that when a cause action is based on a contract, the pleader shall state where the contract was concluded, who represented the parties to the contract, and when the contract was concluded. The essential terms of the alleged contract must also be pleaded. As the plaintiff will have to either admit and deny the alleged agreement, it is entitled to the information required in terms of rule 18 (6) and is prejudiced by the defendants' failure to comply with the rule. It is submitted therefore that the claim in reconvention is accordingly vague and embarrassing.

Fourth ground

[21] The defendants pleaded in paragraph 3.14 of the counterclaim that a decision was taken 'to proceed with WSD' (WSD is assumed to be reference to the plaintiff) as the developer of choice for the purchase of the stands. It is the plaintiff's submission that the pleaded allegation appears to suggest a decision by the defendants to sell certain immovable properties to the plaintiff. The counterclaim contains no allegation where the defendants were at the time when the decision was taken with the registered owner(s) of any stands in the estate development in question. The plaintiff argued that in addition, the counterclaim does not contain sufficient allegations to establish that the defendants (or any of them) were properly mandated by the registered owners of the immovable properties to sell stands on their behalf to the plaintiff. Absent a cogent and legally recognised pleaded explanation, the plaintiff submitted that the claim in reconvention is vague and embarrassing.

Fifth ground

[22] In paragraphs 3.16 to 3.21 of the counterclaim the defendants refer to an alleged agreement between them and the plaintiff pertaining to the sale of 10 stands (i.e. immovable properties). The defendants however failed to comply with the provisions of rule 18 (6) of the Uniform Rules of Court. As the plaintiff will have to either admit or deny the alleged agreement, it is prejudiced by the defendant's failure to comply with the rule. The claim in reconvention is accordingly vague and embarrassing.

[23] It is further submitted that the defendants have failed to plead their compliance with section 2 (1) of the Alienation of Land Act, 68 of 1981 which provides that:

"No alienation of land after the commencement of this section shall, subject to the provisions in section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

It is argued that absent such compliance, the alleged sale agreements in respect of the 10 (ten) properties are void, and the claim in convention accordingly lacks a cause of action, alternatively is vague and embarrassing.

Sixth ground

[24] At paragraphs 6.1 and 6.2 of the counterclaim the defendants purport to institute a claim based on 'loss of income' allegedly flowing (a) plaintiff's 'deviation from the contractually agreed performance criteria and requirements', and (b) persistent negative interference by the plaintiff in the relationship between the defendants and the members/ management of the homeowners' association. Plaintiff's counsel submitted that it is not apparent from the pleaded allegations whether the claim is instituted by both or only one of the defendants. It is argued that the defendants have further failed to plead details of the alleged 'negative interference' by the plaintiff and the consequences allegedly flowing from such interference. The defendants have also failed to plead precisely which contractual breaches caused the loss of income. Viewed against the backdrop of the shortcomings referred to above, the plaintiff submitted that the defendants' cause of action is unclear and accordingly vague and embarrassing, alternatively does not disclose a cause of action.

Seventh complaint

[25] The defendants jointly (not severally) claim damages amounting to R5 000 000.00 (five million rand).

25.1 The damages are made up of an amount of R2.5 million for 'loss of income for work done.' The plaintiff submitted that it is not readily apparent which pleaded allegations in the body of the counterclaim support this cause of action and/or loss or which defendant allegedly suffered this loss. The defendants have also failed to specify which of them performed the work, what the nature of the work was, and on behalf of who/which entity the work was performed.

25.2 The R5 million damages include an amount of R800 000.00 (eight hundred thousand rand) in respect of 'earthworks and consultancy work and services performed.' It is argued by the plaintiff that it is not readily apparent from the counterclaim whether earthworks were performed at the behest of the plaintiff or for the benefit of some other party.

25.3 The damages are lastly calculated with reference to general damages in an amount of R1,7 million, which amount includes compensation for 'wasted time and

effort’ and ‘psychological trauma.’ The plaintiff argued that there are no pleaded allegations in the counterclaim to (a) support such cause of action; and/or (b) explain how the amount of damages is calculated or split between the two defendants. The defendants’ counterclaim is accordingly vague and embarrassing, alternatively does not disclose a cause of action.

[26] The defendants’ counsel argued that rule 4A of the Uniform Rules of Court provide for the service of subsequent documents on any other parties to the litigation by way of electronic mail to the respective address provided. Counsel argued that since proper service of the defendants’ Notice to Amend was effected by electronic mail on the plaintiff’s attorneys, addressing the plaintiff’s exception which service was refused, a proper case was made to dismiss the plaintiff’s exception, and granting the defendants amendments to the counterclaim, and that the plaintiff be held liable for costs occasioned by not accepting service by email on 16 March 2021.

[27] Rule 19(3) of the Uniform Rules of Court provides:

“3 (a)...

(b) The defendant may indicate in the notice of intention to defend whether the defendant is prepared to accept service of all subsequent documents and notices in the suit through any manner- other than the physical address or postal address, and if so shall state such preferred manner of service.

(c) The plaintiff may at the written request of the defendant deliver consent in writing to the exchange or service by both parties of subsequent documents and notice in the suit by way of facsimile or electronic mail.

(d) if the plaintiff refuses or fails to deliver the consent in writing as provided for in paragraph (c) the court may, on application by the defendant grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances.” (own emphasis)

[28] The current rule 19 clearly makes provision for a party to make an application to court should one of the parties refuse to consent to accept electronic service of a document. *In casu*, the defendants made no request to the plaintiff for consent in

writing for the service of documents by email, nor did the defendants make an application to court to grant such consent. The service of Notice to Amend by the defendant on 16 March 2021 was therefore not proper service.

[29] I am persuaded that the plaintiff's exception actually displays that the defendants' claim in convention does not disclose a cause of action alternatively is vague and embarrassing, and that the plaintiff is not in a position to answer to the defendants' counterclaim. The excipient is therefore entitled to an order upholding the exception.

[30] The upholding of an exception disposes of the pleading against which exception was taken but not of the respondent's action or defence. Accordingly, the proper order is to uphold the exception and grant the defendant leave to amend the offending pleading within a specified period, and not dismiss the claim or grant judgment.¹⁰

[31] The following order is therefore made:

- (1) The plaintiff's exception is upheld with costs.
- (2) The defendants are afforded a period of 20 (twenty) days from the date of this order within which to amend the claim in reconvention.



DS MOLEFE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

¹⁰ Constantaras v BCE Foodservice Equipment (Pty) Ltd 2007 (6) SA 338 (SCA).

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 July 2022.

APPEARANCES

Counsel for the Applicants:

Instructed by:

ADV. J VORSTER

F VAN WYK ATTORNEYS

Counsel for the Respondents:

Instructed by:

MR H KAPP

HENK KAPP ATTORNEYS

Date heard:

Date of judgment:

03 May 2022

25 July 2022