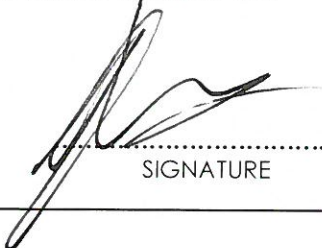




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
6/5/2021 DATE	
 SIGNATURE	

Case Number: 65643/2017

BARLOW WORLD SOUTH AFRICA (PTY) LTD
(Registration number 1946/021661/07)

Plaintiff / Respondent

and

PAT MALABELA ELECTRICAL CONTRACTORS
AND METER READERS CC
(Registration number 2000/043538/23)
PAT J MALABELA

First Defendant / Excipient

Second Defendant / Excipient

JUDGMENT

H G A SNYMAN AJ

INTRODUCTION

[1] This is an exception by the first and second defendants / excipients (where

applicable collectively referred to herein as "*the excipients*") against the plaintiff's particulars of claim as amended on 11 February 2020 ("*the particulars of claim*").

- [2] Although the introductory paragraph of the exception dated 6 August 2020 states that it is an exception on the basis that the particulars of claim are vague and embarrassing and/or lack averments necessary to sustain a cause of action, it is apparent from the exception itself that it is only brought on the basis that the portions of the particulars of claim complained about are vague and embarrassing.

BACKGROUND

- [3] The plaintiff is a private company trading as Avis Rent a Car. The plaintiff instituted action against the excipients on 19 September 2017. As part of the claim, the plaintiff is claiming payment in the amount of R754,820.63 from the excipients with interest at the rate of 9% per annum calculated from 17 August 2017 to final date of payment.
- [4] The claim against the first defendant is based thereon that the first defendant rented motor vehicles from the plaintiff for which it has not paid. It appears from paragraph 5 of the particulars of claim that the second defendant is joined as a defendant since it is alleged that he bound himself as surety and co-principal debtor with the first defendant in favour of the plaintiff in terms of

a written deed of suretyship annexed as annexure “B” to the particulars of claim.

- [5] It appears from paragraph 3.1 of the particulars of claim that it is pleaded that or about 11 February 2016 and at or near Johannesburg, the first defendant applied in writing for a corporate account with the plaintiff, subject to the standard “*TERMS AND CONDITIONS OF SUPPLY AND USE OF AVIS CHARGE CARDS AND CAR RENTAL VOUCHERS*”.
- [6] According to the particulars of claim, the plaintiff is not in possession of the original of the written application as it is in the possession of the first defendant. A true copy of the face of the written application is attached to the particulars of claim as annexure “A1”. A true copy of the standard “*TERMS AND CONDITIONS OF SUPPLY AND USE OF AVIS CHARGE CARDS AND CAR RENTAL VOUCHERS*” is attached to the particulars of claim as annexure “A2”.
- [7] It is pleaded in paragraph 3.5 of the particulars of claim that on or about 11 February 2016 the plaintiff approved the first defendant’s application under Avis account number AV884049300004. According to paragraph 3.6 a written “*Approved Corporate Account Application Agreement*” was entered into between the plaintiff and the first defendant on or about 11 February 2016.

[8] In paragraph 4 of the particulars of claim it is pleaded that:

"The express, alternatively the implied, further alternatively tacit, terms and conditions of the written Approved Corporate Account Application Agreement that are material to [the] action are:

- 4.1 The First Defendant would, from time to time, rent vehicles from the Plaintiff at the rates agreed upon between the parties.*
- 4.2 Upon presentation to the Plaintiff of a card or voucher issued under these terms and conditions for the renting of a vehicle by any person, the person will be required to sign a rental agreement.*
- 4.3 If, in terms of such a rental agreement, any of these Terms and Conditions or any other arrangements or agreements between the Plaintiff and the First Defendant are varied by or at the instance of such person, the First Defendant shall be bound by such variations in respect of rental of such vehicle.*
- 4.4 In the event of conflict between these Standard Terms and Conditions and the Terms and Conditions of a rental agreement offered by the Plaintiff, the provisions of the rental agreement shall prevail.*
- 4.5 The Plaintiff will invoice the First Defendant in respect of each motor vehicle rented by the First Defendant at the completion of each rental.*
- 4.6 Payment of each invoice becomes due upon receipt of the invoice.*
- 4.7 Unless queries by the First Defendant are notified to the Plaintiff within seven days of receipt of the invoice, such invoice shall be deemed to be accurate and complete for all purposes.*
- 4.8 The Plaintiff reserves the right to levy a late payment charge at the rate of 2.5% per four-week period, calculated on a daily basis commencing on the due date for payment."*

[9] In paragraph 6 of the particulars of claim it is pleaded that:

"Subsequent to the agreement, the First Defendant rented motor vehicles from the Plaintiff on 49 occasions during the period October 2016 to July 2017."

[10] It is pleaded in paragraph 7 of the particulars of claim that in fulfilment of its obligations towards the first defendant in terms of the contract, the plaintiff duly furnished the first defendant with invoices in respect of each motor vehicle rented by the plaintiff to the first defendant at the completion of each of the 49 rentals. True copies of the 49 invoices in question are attached to the particulars of claim as annexure "D1" to "D49". It is pleaded that the contents of these invoices are incorporated by reference. A schedule setting out the relevant dates and amounts of each of these invoices is annexed to the particulars of claim as annexure "C".

[11] It is pleaded in paragraph 9 that each of the invoices bears a date, which date corresponds with the date upon which the first defendant received the invoice concerned and was accordingly due and payable on a given date. It is pleaded in paragraph 11 that in breach of its obligations towards the plaintiff in terms of the contract, the first defendant failed to make payment on the 49 invoices. Based on this it is pleaded that the first defendant is indebted to the plaintiff for the said amount.

[12] During January 2020 the plaintiff gave notice of its intention to amend its

particulars of claim, which amendment was affected on 12 February 2020. It is this amended particulars of claim which forms the subject of this exception.

[13] The exception dated 6 August 2020, i.e. the one relevant for purposes of this application (referred to herein as “*the exception*”) is the third exception against the particulars of claim. The first two exceptions noted on respectively 26 February 2020 and 20 March 2020 were not proceeded with, but withdrawn by the excipients. This was on the basis of “*technical difficulty*”: The first exception was not signed by an attorney with the right of appearance in this Court. The second exception was not signed at all.

[14] The grounds of the exception are that:

- “a. *In paragraph 3 of the particulars of claim it is asserted that the First Defendant applied for a corporate account (‘the application’) subject, allegedly, to certain terms and conditions (‘the conditions’).*
- b. *The application is attached as annexure ‘A1’ to the particulars of claim and the conditions are annexed to the particulars of claim as annexure ‘A2’.*
- c. *The application and the conditions are allegedly to embody a written agreement between the parties in terms whereof the First Defendant would rent vehicles from the Plaintiff (‘the agreement’).*
- d. *In clause 2 of the conditions it states that:*

‘In making this application, the Applicant agrees to the terms and conditions printed on the carrier with which a card is issued and on the vouchers, which terms and conditions shall form part

of the conditions ...

Upon presentation to Avis of a card or voucher under these terms and conditions for renting of a vehicle by any person, the person will be required to sign a rental agreement. If in terms of such rental agreement any of these terms and conditions or any other arrangements or agreements between Avis and the Applicant are varied by or at the instance of such person, the Applicant shall be bound by such variations in respect of the rental of such vehicle.'

- e. In paragraph 6 to 10 of the particulars of claim it is alleged that the First Defendant rented motor vehicles from the Plaintiff on 49 occasions and the charges imposed by the Plaintiff for these 49 rentals form the subject matter of the Plaintiff's claim.*
- f. On the Plaintiff's version, and having regard to its reliance on the conditions, the Plaintiff, in addition to the agreement, would have had to have concluded 49 separate rental agreements with the First Defendant and issue vouchers in respect of each rental agreement such that each such rental agreement, read with the form, the conditions and the vouchers, would create the agreement between the Plaintiff and the First Defendant in relation to such rental.*
- g. The Plaintiff has however, failed to refer in its particulars of claim to any of the 49 separate rental agreements that the Plaintiff would have to have concluded with the First Defendant.*
- h. In the circumstances the particulars of claim are vague and embarrassing and are excipiable in that regard."*

THE TEST TO BE APPLIED

- [15] Rule 18(4) of the Uniform Rules of Court ("the rules") requires that: "Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the

opposite party to reply thereto."

- [16] To give effect to the requirement in rule 18(4) a plaintiff is required to plead *facta probanda*; namely the material facts, and not conclusions, that (if proved) will disclose a cause of action. *Facta probantia* on the other hand, are the particulars of all the evidence that the plaintiff will lead in order to prove the pleaded material facts. **Makgae v Sentraboer (Koöperatief) Beperk 1981 (4) SA 239 (T) at 245D** puts the point crisply.
- [17] An exception based thereon that the pleading is vague and embarrassing, is directed at the formulation of the whole cause of action, or defence. Exceptions like these are intended to cover the case where there is some or other defect or incompleteness in the pleading, which results in embarrassment to the pleader, despite a cause of action or defence being apparent from the pleading. See **Van Loggerenberg, Erasmus: Superior Court Practice RS 15, 2020 at D1-298A – D1-301**. In **Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 899E, D and G** it is *inter alia* stated in this regard that: "*The test formulated in Factory Investments (Pty) Ltd v Record industries Limited 1957 (2) SA 306 (T) following Keely v Heller 1904 TS 101 is whether an intelligible cause of action can be ascertained. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity: Trope and Others v South African Reserve Bank 1993 (3) SA 264 (A). An exception that a*

pleading is vague and embarrassing cannot be directed at a particular paragraph within a cause of action. The exception must go to the whole cause of action, which must be demonstrated to be vague and embarrassing."

[18] In order for an exception to succeed on grounds of vagueness and embarrassment, it must be demonstrated that the excipient will be "*seriously prejudiced*" if the offending allegations are not expunged. The excipient carries the onus to show vagueness amounting to an embarrassment and embarrassment amounting to prejudice, failing which the exception cannot succeed. [Quinlan v MacGregor 1960 (4) SA 383 (D) at 393F-H.]

[19] In Trope v South African Reserve Bank and Another and Two Other Cases 1992 (3) SA 208 (T) the court explained the principle that underpins the requirement of particularity in rule 18(4) to be this (at 210G-H): "*It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made ...*".

[20] The court at 211B summarised the position as follows: "*An exception to a*

pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced."

- [21] The ultimate test as to whether or not an exception should be upheld on this ground, is whether the excipient is prejudiced. 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. **ABSA Bank Ltd v Boksburg Transitional Local Council 1997 (2) SA 415 (W) at 421I to 422A.**
- [22] In summary, therefore, as I see it, vagueness amounting to embarrassment and embarrassment in turn resulting in prejudice must be shown. Vagueness would invariably be caused by a defect or 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 the pleading is vague and embarrassing, unless the excipient will be seriously prejudiced if compelled to plead against which the objection lies.
- [23] It was common cause between the parties at the hearing of this matter that an excipient is bound to the grounds listed in its exception and cannot go wider than that in argument. Counsel for the plaintiff referred me in this regard

to Jowell v Bramwell-Jones and Others *supra* at 898A-C where the following is stated: “*I agree with counsel for the plaintiff that these general statements apply to an exception. A party is bound by the terms in which it is framed and by the issues which it raises. Erasmus Superior Court Practice B1-163. Inkin v Borehole Drillers 1949 (2) SA 366 (A) at 373 provides examples of a refusal to entertain a contention not covered by the grounds of exception. See also Jack Smith and Joe’s (Pty) Ltd 1929 TPD 323 at 327. An exception that a cause of action is vague and embarrassing is an entirely different proceeding from one based on Rule 30. It does not allow a court to treat the matter as if there was non-compliance with Rule 18, which deals with matters to be contained in pleadings.*”

ARGUMENT ON BEHALF OF THE EXCIPIENTS

- [24] It was argued on behalf of the excipients that rule 18(6) of the rules provides that a party seeming to rely on a contract is to provide particular details thereto, including where, when and by whom it was concluded, whether it is oral or in writing, in which event it is to be annexed to the pleadings. When challenged in argument on behalf of the plaintiff that the excipients cannot rely on this rule for purposes of the exception as it was not raised in their grounds of exception, and that in any event non-compliance with the rules is something different than an exception, counsel for the excipients referred me in reply to the matter of Yannakou v Apollo Club 1974 (1) SA 614 (A). She

submitted that this is authority for the principal that with regards to for instance the pleading of a statute, it is not necessary to have cited or quoted directly what the statute had to say as long as it is clearly understood that this is what is being relied upon. She submitted that the same applies in so far as exceptions are concerned, i.e. that to the extent that it is clear on what the excipient relies for purposes of the contention that the pleadings are vague and embarrassing, it is not necessary for the specific rule based upon which the complaint is made to be mentioned. She also referred me to the commentary in Erasmus under rule 18(6) where it is mentioned that exceptions were raised in respect of non-compliance with rule 18(6).

[25] Counsel for the excipients argued that it is incumbent upon a plaintiff to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely and on which evidence will be led. It was argued that for purposes of pleading, it is essential for the excipients to know what the contract is on which the plaintiff is relying. If that is not the case, the pleadings would be rendered vague and embarrassing.

[26] It was argued that in the present matter, the plaintiff relies on a written agreement made up of the "*Application and the Terms and Conditions thereto*". According to counsel for the excipients the plaintiff pleads the specific material clauses on which it relies for its claim. It was then argued that the plaintiff's pleaded clauses include that on the presentation to the

plaintiff of a card or voucher issued under these terms and conditions for renting of a vehicle by any person, the person "*will be required to sign a rental agreement*".

[27] Counsel for the excipients emphasised that in terms of such rental agreement any of the terms and conditions or any other arrangement or arrangements between the plaintiff and the first defendant are varied by or at the instance of such person: "*the first defendant shall be bound by such variations in respect of the rental of such vehicles and in the event of conflict between the Terms and Conditions and the Rental Agreement offered by the Plaintiff, the provisions of the Rental Agreement shall prevail.*"

[28] With reference to the fact that the plaintiff pleaded that there were 49 invoices issued, it was argued on behalf of the excipients that it appears that the plaintiff is actually relying on 49 rentals, which would imply, on a basic reading of the terms and conditions, that there should be the 49 rental agreements each of which would vary the terms of the application and the terms and conditions.

[29] The cause of complaint in argument was that the plaintiff failed to attach any rental agreements and in the circumstances the excipients are not able to plead to an agreement which had been varied. It was argued that without being afforded an opportunity to have sight of the rental agreements, the excipients are prejudiced in pleading to the particulars of claim, in that the

agreement upon which the plaintiff relies has been omitted.

- [30] It was also argued in addition that the terms and conditions reference the issue of a card or voucher, which contains its own terms and conditions that supplement those which form part of the application. It was then argued that the plaintiff does not attach any of these cards or vouchers for the 49 rentals and it is therefore not possible for the excipients to ascertain to what extent the initial agreement has been supplemented.
- [31] The submission was that it is essential for the excipients to know what the contract is that the plaintiff seeks to rely on. The submission was made that in the face of the written agreement having been supplemented and varied the plaintiffs are not able to ascertain what this contract is.
- [32] In response to the argument on behalf of the plaintiff that the second defendant knows everything, i.e. it has the contract, it has the registration numbers of the vehicles rented, the periods for which they were rented, by who and the fee as this appears from the invoices, counsel for the defendant disagreed. She submitted that this is the bone of contention, i.e. that the first defendant does not have the agreements in question. It has the application and the standard terms. She referred me in this regard to clause four of the standard "*TERMS AND CONDITIONS OF SUPPLY AND USE OF AVIS CHARGE CARDS AND CAR RENTAL VOUCHERS*" where it is stated under the heading "*Payment*" that: "*Avis will invoice the Applicant in respect of each*

vehicle rented by a Cardholder or Renter and/or at the completion of each rental, the Applicant or Cardholder or Renter may request a copy of the fully completed rental agreement.” She submitted that the fact that there is a reference to an “*invoice*” and a “*rental agreement*” in the same sentence, indicates that an invoice is not sufficient to cover what is supposed to be in the written rental agreement. She also submitted that based on the fact that an agreement is referred to in the terms, the excipients are allowed to request a copy of it.

- [33] Counsel for the excipients therefore concluded for these reasons, that the particulars of claim are vague and embarrassing and that it was incumbent upon the excipients to except thereto.

ARGUMENT ON BEHALF OF THE PLAINTIFF

- [34] It was argued that the plaintiff’s amended particulars of claim are neither vague nor embarrassing. It was submitted in this regard that the amended particulars of claim is such that a clear and single meaning can be distilled therefrom. It was in this regard *inter alia* submitted in the heads of argument that the rules have over the years progressively been amended to require fewer and fewer averments to be made. Reference was made in this regard to the words of Botha J in the matter of **South African Railways and Harbours v Deal Enterprises (Pty) Ltd** 1975 (3) SA 944 (W) at 947 where it was held that:

"Whereas formerly a plaintiff was obliged to furnish such particulars as were 'reasonably necessary' to enable the defendant to plead or tender, the position is now that such particulars only are required to be furnished as are strictly necessary [plaintiff's emphasis]. For either of the said purposes; the new Rule has restricted the scope of request of particulars to 'absolute essential' ..."

[35] Even if the particulars of claim is said to be vague and embarrassing counsel for the plaintiff submitted that it is not of the kind which strikes to the root of the matter. Counsel referred in this regard to **Jowell v Bromwell-Jones** *supra* where it was clearly pointed out that for an exception to succeed on the basis of the pleadings being vague and embarrassing, it has to strike at the root of the entire cause of action.

[36] Counsel for the plaintiff referred me in this regard to the matter of **Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) 2008 (4) SA 639 (C)** at pages 643I - 644A where at page 645, more specifically paragraph 16, it is specifically said that: *"The basic requirement is that the defendant must have a clear enough exposition of the plaintiff's case to enable it to take instructions from the client and file an adequate response to the claim in the form of a plea."* It was argued that the defendant should be in the position to admit, deny, or admit and avoid, or confess and avoid. This, he submitted, may consist of a bare denial seriatim of all averments in the particulars of claim, as long as there is no ambiguity in such denial.

[37] Counsel for the plaintiff submitted that it would seem that the excipients want

to rely on specific terms and conditions only without looking at the terms and conditions as a whole. He submitted that if one has regard to all the paragraphs pleaded, with reference to the printed terms and conditions, which is annexed as annexure “A2”, that is incorporated in the terms and conditions, the rental agreements are there, and they are transactions which form part and parcel of the agreement. It is an open, “*umbrella*” agreement. What this means, it was submitted, is that the excipients can transact on that account, but they have to pay the full amount of all their transactions in terms of the main agreement. Counsel for the plaintiff submitted that it is clear from the particulars of claim that on 49 occasions the first defendant or its employees rented motor vehicles from the plaintiff. That is not vague and embarrassing. That is what the first defendant “*purchased*”. The plaintiff pleaded the *facta probanda*. The *facta probantia* is how the plaintiff will be able to prove that which it pleaded.

- [38] Counsel for plaintiff submitted that what was pleaded is that each time the person renting the vehicle has to sign a rental agreement, but it goes further than that, and the excipients stopping there is a red herring. He submitted that the schedule, being the statement as well as the individual invoices, is pleaded in paragraph 4.5 of the particulars of claim. The position as pleaded is that the plaintiff will invoice the first defendant in respect of each motor vehicle rented by the first defendant at the completion of each rental. He submitted that this happened, and this is why there is an umbrella agreement.

He submitted that this falls under the open agreement, namely that you can rent as many vehicles as you want to. It says that the plaintiff will invoice the first defendant in respect of each motor vehicle rented by the first defendant at the completion of each rental. Payment of each invoice becomes due upon receipt of the invoice, unless queries by the first defendant are notified to the plaintiff within 7 days of receipt of the invoice. Such invoice shall be deemed to be accurate and complete for all purposes. Therefore it is due, owing and payable.

- [39] Regarding the submission on behalf of the excipients that there is the indication that there is another contract, which terms may differ from the overall agreement, which causes prejudice as at the trial it may come out that there are different terms and so forth, counsel for the plaintiff submitted that the excipients have the right to ask for further particulars for trial purposes, and they also have the right to ask for discovery. If they are not satisfied with discovery then they may proceed to ask for further and better discovery. If that is not at hand, they may ask that the pleading be struck. So, they are not remediless. He submitted that the particulars and the annexures thereto have to be read *in toto*. The excipients cannot just pick out one sentence. If it is read *in toto*, then it is not vague and embarrassing. There is a proper cause of action made out to which the excipients know exactly what they have to answer to. It has to answer to whether it is indebted to the plaintiff in terms of the overall agreement in the amounts as set out in the statement, which is

the schedule, as well as the invoices. Counsel for the plaintiff submitted that there can be no doubt that the excipients know exactly what the plaintiff's case is.

[40] Counsel for the plaintiff agreed with my statement from the bench that the excipients are parties to this agreement. They can of course plead that the terms of the contract that the plaintiff alleges, have been changed. It is not just for the plaintiff to come and say this is the agreement.

[41] In response to a submission on behalf of the excipients that a different account number appears on the invoices, it was submitted that if a motor vehicle is rented, each transaction gets a different number. However, the overall number remains the same.

[42] Counsel for the plaintiff then went through the particulars of the invoices showing that all the necessary details appear from these invoices, which would enable the excipients to plead. It was therefore submitted that there was clearly no prejudice for the excipients.

[43] It was also submitted that an excipient is obliged to confine his complaint to the stated grounds of his exception. (**Jowell v Bromwell-Jones 1998 (1) SA 836 (W) at 899A.**) To the extent that the excipients in the heads of argument filed on their behalf and before this court relied on rule 18(6) of the rules in support of the exception, it was submitted that this amounted to an attempt

to go outside their grounds of exception as there was no reliance placed on non-compliance with rule 18(6) in the grounds of exception.

[44] Counsel for the plaintiff proceeded to submit that compliance with rule 18 is a different matter to an exception. Particulars of claim may fail to comply with rule 18, thus bringing into play rule 30 via rule 18(12), without being vague and embarrassing.

[45] Counsel for the plaintiff therefore submitted that it can never be said that the pleadings are vague and embarrassing.

DISCUSSION

[46] As I see it, based on the excipients' grounds of exception, in particular paragraphs f, g and h thereof, the excipients' sole cause of complaint is that on the plaintiff's version the plaintiff would have had to conclude 49 separate rental agreements with the first defendant, and issue vouchers in respect of each of these 49 separate rental agreements, such that each such rental agreement, read with the form, the conditions and the vouchers, would create the agreement between the plaintiff and the first defendant in relation to such rental.

[47] The complaint is then that the plaintiff has failed to refer in its particulars of claim to any of the 49 separate rental agreements that the plaintiff would

have to have concluded with the first defendant, which, under the circumstances, renders the particulars of claim vague and embarrassing and therefore excipiable.

[48] The complaint is therefore not that copies of the inferred 49 agreements are not attached to the particulars of claim, but that they are not referred to in the particulars of claim.

[49] Rule 18(6) provides that a party who in his pleadings relies on a contract shall state whether the contract is writing or oral and when, where and by whom it was concluded, and if the contract is in writing a true copy thereof, or of the part relied on in pleading shall be annexed to the pleading.

[50] It is, however, not the plaintiff who pleads in the particulars of claim that there were these 49 separate contracts. It is the excipients who allege this based on their analysis of the pleadings, namely that there must have been these 49 contracts. It then complains that the plaintiff failed to refer to these. This, in my view, is untenable, even if I accept that the excipients by reference refer to rule 18(6), even though they did not expressly say so.

[51] It is simply not pleaded by the plaintiff on a basic reading of the pleadings that there were 49 rental agreements each of which would vary the terms of the application and the terms and conditions. In any event, the first defendant was a party to the agreement entered into between it and the plaintiff. If it

contends that the terms were varied and different terms applied than what appears from the plaintiff's pleading, that may be pleaded by it in answer to the particulars of claim.

[52] As I see it, the plaintiff pleaded a complete cause of action, which identifies the issues upon which the plaintiff seeks to rely and on which evidence will be led. It cannot in my view be said that the excipients do not know what the contract is on which the plaintiff is relying.

[53] The excipients' exception in the words of **Jowell v Bramwell-Jones and others** *supra*, with reference to the **Trope** matter *supra*, is directed at a particular paragraph within a cause of action, in this instance not even a paragraph of the pleading but a paragraph of the standard "*TERMS AND CONDITIONS OF SUPPLY AND USE OF AVIS CHARGE CARDS AND CAR RENTAL VOUCHERS*". As I see it, the exception does not go to the whole of the cause of action, which must be demonstrated to be vague and embarrassing. It does not take into account the plaintiff's case pleaded as a whole.

[54] It can, in my view, also not be argued that the excipients are "*seriously prejudiced*" if the offending allegations are not expunged. The exception does not go to the whole of the cause of action. It is pinpointed at a particular paragraph.

[55] As I therefore see it, the excipients have failed to show vagueness amounting to an embarrassment and embarrassment amounting to prejudice. Their exception can therefore not succeed.

[56] As I see it, the excipients are clearly able to come to trial prepared to meet the case of the plaintiff and will not be taken by surprise. To the extent that they require further particulars, these can be requested.

[57] If the excipients allege that there were non-compliance with the rules by the plaintiff not annexing agreements to its particulars of claim on which it relies, they should have launched rule 30 proceedings if they thought they were entitled to do so. They cannot now raise this as part of this exception. Moreover, if the excipients contend that reference is made to a document (the alleged other agreement) in the terms and conditions where it is referred to in the same sentence than an invoice and that they are entitled to it, they could have sought the production of this document in terms of rule 35(12), although the alleged reference to the document was only made in the annexure, i.e. paragraph 4 of the standard “*TERMS AND CONDITIONS OF SUPPLY AND USE OF AVIS CHARGE CARDS AND CAR RENTAL VOUCHERS*” under the heading “*PAYMENT*”. See **Democratic Alliance and others v Mkhwebane and another** (13 70/2019) [2021] ZASCA 18 (18 March 2021) paragraph 37. But the time for all this is long past. By referring to the said remedies, I do not say that the excipients are entitled to it.

Reference to these is merely to show that the excipients attempt to do as part of this exception should have been done under the different provisions of the rules. What this application is concerned with is whether plaintiff's particulars of claim are vague and embarrassing. In my view, they are not.

[58] Even if I am wrong that the particulars of claim are not vague and embarrassing it is, in my view, not of the kind which strikes at the root of the matter. As I see it, the excipients have a clear enough exposition of the plaintiff's case to enable them to provide instructions and to file an adequate response to the claim in the form of a plea. The excipients are clearly in the position to admit, deny, or admit and avoid, or confess and avoid.

[59] In the result, I find that the excipients' exception lacks merit and ought not to be upheld.

COSTS

[60] Counsel for the plaintiff asked me to order the excipients to pay the costs.

[61] I see no reason why costs should not follow the event.

[62] Under the circumstances the following orders are made.

ORDER

1. The exception of the first and second defendants / excipients dated 6 August 2020 is dismissed with costs.
2. The first and second defendants / excipients are ordered to pay the costs of the plaintiff / respondent.



H G A SNYMAN
Acting Judge of the Gauteng High Court
Pretoria

Virtually heard: 24 February 2021

Electronically delivered: 6 May 2021

Appearances:

For the plaintiff / respondent: Adv B "*Birgit*" Brammer, instructed by
Faber Goertz Ellis Austen Inc.

For the defendants / excipients: Adv MCC "*Toy*" De Klerk, instructed by
Snyman de Jager Inc.