



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**Not Reportable
Case No: 3403/2019**

In the matter between:

**MILLS FITCHET
(NATAL) (PTY) LTD**

PLAINTIFF/RESPONDENT

and

MPOFANA MUNICIPALITY

DEFENDANT/EXCIPIENT

ORDER

The defendant's exception is dismissed with costs.

JUDGMENT

Mathenjwa AJ

Introduction

[1] The plaintiff, who is the defendant in the claim in reconvention, instituted an action against the defendant, who is the plaintiff in the claim

in reconvention, in which it claims payment of a sum of money arising out of breach of contract.

[2] The defendant pleaded to the plaintiff's claim, and raised a counterclaim against the plaintiff, in which it claims a declaration that the original contract between the parties is invalid *ab initio* and seeks repayment of the sum of money paid to the plaintiff in terms of the contract.

[3] In paragraph 2 of the counterclaim, the defendant incorporated the plaintiff's averments in paragraphs 1–4 of the claim in convention, as if specifically stated, and further stated that 'save for the fact that the annexure "POC1" lacks the SCM "proposal" of the plaintiff, which the plaintiff has claimed is an essential of the contract'. It is noted that paragraphs 1 and 2 of the particulars of claim contain the citation of the parties, paragraph 3 states that the parties entered into a written contract, and paragraph 4 states that a copy of the agreement is annexed thereto and marked annexure 'POC1'.

[4] The plaintiff pleaded to the defendant's counterclaim. In pleading to paragraph 2 of the counterclaim, the plaintiff stated that 'the contents of these paragraphs are noted'. The defendant took an exception to the plaintiff's plea on the ground that the plaintiff's plea is vague and embarrassing, in that it lacks particularity to an extent amounting to vagueness, and the result is that the defendant is prejudiced in not being able to properly plead further thereto.

The respondent's grounds of exception

[5] I now turn to the defendant's grounds of exception.

[6] At paragraph 1 of the plea in reconvention, the plaintiff simply notes the averment of the defendant that the contract lacks the SCM proposal of the plaintiff. The defendant requires the plaintiff to indicate whether it will produce the said SCM proposal, or whether it has abandoned same. The defendant also requires the SCM proposal in order to plead further, and because the SCM proposal is an essential aspect of the contract itself. The defendant avers that the plaintiff cannot simply ignore the fact that the SCM proposal is 'missing'.

[7] In paragraph 5 of the plea in reconvention, the plaintiff denies that the defendant made payments in respect of each of the plaintiff's invoices, without specifying which invoices were not paid. The plaintiff refers to the particulars of claim in this regard, but therein is contained only a payment of an amount of R37 142.71 for the period of 1 July 2015 to 30 June 2016. The defendant requires the plaintiff to indicate which invoice or invoices were not paid, with specific reference to invoice numbers or through the production of copies of those invoices.

[8] At paragraph 13 of the plea in reconvention, the plaintiff refers to the non-payment by the defendant of each tax invoice rendered, without producing any details about these tax invoices. The defendant avers that it is unable to plead further without the invoice numbers or copies of the invoices themselves.

[9] At paragraph 14 of the plea in reconvention, the plaintiff states that it duly performed its obligation in terms of the agreement. However, according to the defendant, the agreement required that monthly reports be submitted as proof of work done. The defendant states that the plaintiff has

failed to refer to these monthly reports, and has not attached these to its plea. Allegedly, the defendant cannot plead further because it does not know which monthly reports the plaintiff is referring to, and accordingly requires the plaintiff to list the monthly reports to which it refers or to append them to the plea.

[10] At paragraph 14 of the plea in reconvention, the plaintiff denies the averment of the defendant, without indicating what amounts were paid during that period if the amount of R2 913 969 is not correct. It is stated that the defendant cannot plead further without verifying what payments the plaintiff admitted to receiving, and the plaintiff is accordingly required to state exactly what amount it received in that period as payment for services rendered.

[11] In paragraph 18 of the plea in reconvention, the plaintiff again states that the payments made did not cover each and every invoice delivered to the defendant. The defendant again requires the plaintiff to indicate which invoices were paid and which were not, or which were partially paid, and to attach copies of those invoices to the plea.

[12] At paragraph 19 of the plea in reconvention, the plaintiff again simply denies the averment. The defendant is allegedly unsure whether this indicates that nothing was paid by the defendant to the plaintiff in this period. The defendant requests this information to be able to verify what was not paid and the reason for the non-payment. It is also stated that this information would shorten the number of issues in dispute at trial.

[13] At paragraph 20 of the plea in reconvention, the plaintiff again states that not each and every invoice was paid. The defendant again requires the

plaintiff to indicate which invoices were paid and which were not. The defendant avers that it requires this information to know how to plead further and that this will reduce the issues in dispute.

The law

[14] Uniform rule 22 entitles a defendant to deliver a claim in reconvention. Further, the defendant is allowed to incorporate allegations contained in the plaintiff's particulars of claim, by way of reference, into the defendant's counterclaim. (See DE Van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* (2019 – Revision Service 8) at D1–313.)

[15] However, a claim in convention and a claim in reconvention are two separate actions with distinct sets of pleadings. In explaining the distinctiveness of the claim in convention and the claim in reconvention, Lansdown J in *Fielding v Sociedade Industrial de Oleos Limitada* 1935 NPD 540 at 548 held that:

‘The only point of contact between claim and counterclaim in this case is that both the plaintiff's claim for commission and disbursements, and the defendant's counterclaim for damages, arise out of transactions concluded under and by virtue of the same contract of agency between them. The claims are entirely different in their nature, and the counterclaim is quite misplaced in the plea. The undesirability, from the point of view of procedure, of embodying in the plea the substance of the counterclaim is obvious. The two actions are separate and distinct, and each must have its separate set of pleadings. But if the allegations of the counterclaim are embodied in the plea, plaintiff's replication must deal with those allegations, and thus the issues of the claim in convention would become confused, in the same set of pleadings, with those of the reconventional claim.’

[16] Accordingly, although the claim in convention and claim in reconvention may arise from the same contract, these claims are distinctive and any deficiency in the claim in convention may not be cured in the claim in reconvention.

[17] Uniform rule 18(4) requires every pleading to

‘. . . 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.’

Uniform rule 18(5) requires a party when denying any ‘. . . allegation of fact in the previous pleading of the opposite party, he shall not do so evasively but shall answer the point of substance’.

[18] If the pleading is not clear and concise or if the denial of an allegation of fact in the previous pleading of an opposite party is done evasively, the opposite party is entitled to call on the other party to remedy such irregular step in terms of Uniform rule 30. If the pleading is furthermore vague and embarrassing, the opposite party is entitled to raise an exception.

[19] An exception is regulated by Uniform rule 23 of the court. Rule 23(1) entitles an opposing party to deliver an exception when ‘. . . any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be. . .’. Rule 23(1)(a) provides that

‘. . . where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice. . .’.

[20] As stated by Ponnann JA in *Picbel Groep Voorsorgfonds (In Liquidation) v Somerville, and related matters* 2013 (5) SA 496 (SCA) para 7, in exception proceedings, the excipient has a duty to persuade the court that the pleading is excipiable, and it follows that the defendant has the duty to persuade the court that the pleadings are vague and embarrassing to an extent that the defendant is prejudiced.

[21] The meaning of the phrase vague and embarrassment was explained in *Leathern v Tredoux* (1911) 32 NPD 346 at 348, where Dowe Wilson JP held that:

‘The object, of course, of all pleadings is that a succinct statement of the grounds upon which a claim is made or resisted shall be set forth shortly and concisely; and where a statement is vague, it is either meaningless, or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on, and therefore it is also something which is insufficient in law to support in whole or in part the action or defence; accordingly, I think that it is not a good objection to an exception that it is taken on the ground that the averment complained of is vague and embarrassing.’

[22] It is not required that a plea should not disclose a defence at all before an exception can be taken, but an exception can be taken even when the plea discloses a defence, but the plea is vague as to the nature and scope of the defence. (See *General Commercial and Industrial Finance Corp Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 455). The defendant should have a clear exposition of the plaintiff’s claim to enable it to plead adequately to the plaintiff’s claim. (See *Venter and others NNO v Barritt Venter and others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) para 15.)

Application of the law to the facts

[23] Mr Moodley, appearing for the defendant, categorised the defendant's grounds of exception into two groups. The first group is based on the lack of the SCM documents being attached to the plaintiff's particulars of claim. The second group of grounds of exception is the lack of particularity in the plaintiff's plea to the defendant's counterclaim.

[24] I now deal with the grounds of exception under the two groups as categorised by Mr Moodley.

The lack of SCM documents

[25] The plaintiff in its particulars of claim referred to a written contract which was attached as annexure 'POC1'. However, there was no reference to the SCM proposal in the plaintiff's particulars of claim. In its plea to the plaintiff's particulars of claim, the defendant admitted the averments that the written agreement is attached as annexure 'POC1', but further stated that 'save for the fact that the annexure POC1 lacks the SCM "proposal" of the plaintiff, which the latter refers to in section E of the contract and which the parties had determined was integral to the contract'. However, save for mentioning that the SCM proposal was not attached to the agreement, the defendant did not pursue the issue of the SCM proposal in the claim in convention.

[26] In paragraph 2 of the defendant's counterclaim, it incorporated the plaintiff's averments dealing with the citation of parties and the nature of the contract which is contained in paragraphs 1–4 of the particulars of claim. The plaintiff pleaded to this paragraph by simply 'noting' these averments.

[27] The first issue for determination is whether the averment that annexure ‘POC1’, which lacks the SCM proposal, constitutes a pleading. Pleadings are defined as

‘. . . “the written statements of the parties served by each party in turn upon the other which must set out in summary form the material facts on which each party relies in support of his claim or defence, as the case may be”.’

(See DE Van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* (2020 Revision Service 15) at D1–228.)

[28] As it was stated in *Minister of Agriculture and Land Affairs and another v De Klerk and others* 2014 (1) SA 212 (SCA) para 39, the object of pleadings is ‘. . . to delineate the issues to enable the other party to know what case has to be met’. For this reason, Uniform rule 18(4) requires every pleading to contain a clear statement of the material facts upon which the pleader relies for his claim, with sufficient particulars to enable the opposite party to reply thereto.

[29] In my view, the mere averment in the claim in reconvention that ‘POC1’ lacks the SCM proposal, is not a clear statement of material fact. The averment does not invite any admission or denial from the plaintiff, hence the plaintiff noted that ‘POC1’ in its claim in convention lacks the SCM proposal.

[30] The defendant had the opportunity to deal with the lack of the SCM proposal in its plea to the plaintiff’s particulars of claim in convention, but failed to do so. Therefore, the defendant cannot cure the defect in its plea in convention, in the counterclaim.

[31] Though the plaintiff's claim in convention and the defendant's claim in reconvention arise from the transaction concluded by virtue of the same contract between the parties, the two claims remain two separate actions with distinct sets of pleadings. Thus, the exception based on this ground should be dismissed.

Lack of particularity in the plaintiff's plea to the counterclaim

[32] I now turn to the second group of grounds of exception. These grounds relate to lack of particularity:

- (a) In paragraph 4 of its exception, the defendant requires the plaintiff to indicate which invoices were not paid or to produce those invoices.
- (b) In paragraph 5, the defendant requires the plaintiff to produce those invoices in respect of which it is alleged that the defendant has not made payment.
- (c) In paragraph 6, the defendant refers to paragraph 14 of the plaintiff's plea in reconvention, where the plaintiff pleaded that it duly performed its obligations in terms of the agreement. The defendant submits that since the agreement required that monthly reports be submitted as proof of work done, the plaintiff is required to refer to or attach these reports.
- (d) In paragraph 7, the defendant refers to paragraph 14 of the plaintiff's plea in which the plaintiff pleaded that the defendant breached the terms of the agreement by failing to effect payment to the plaintiff in respect of each tax invoice rendered. The respondent requires the plaintiff to state exactly what amount it received in that period as payment for services rendered.
- (e) In paragraph 8, the defendant further requires the plaintiff to include copies of those invoices in respect of which the defendant did not make payment.

(f) In paragraph 9, the defendant refers to paragraph 19 of the plaintiff's plea in which the plaintiff denied the allegation in paragraph 16 of the claim in reconvention that, on 3 August 2018, the defendant made payment to the plaintiff in the amount of R109 250. The defendant requires information whether the denial indicated that nothing was paid by the defendant to the plaintiff in this period.

(g) In paragraph 10, the defendant refers to paragraph 20 of the plaintiff's plea in which the plaintiff admitted payment by the defendant in the amount of R211 718.46 on 23 March 2018, but alleged that this payment did not cover each and every tax invoice rendered by the plaintiff during this period. The defendant requires the plaintiff to indicate which invoices were paid and which were not paid.

[33] In summing up this group of grounds of exception, it is apparent that in paragraphs 4, 5, 8 and 10, the defendant requires the plaintiff to produce invoices to support its defence. In paragraph 6, the defendant requires the plaintiff to produce monthly reports as proof for work done by the plaintiff, in paragraph 7 it requires information on specific amounts received in that month, and in paragraph 9 it requires clarity whether the denial by the plaintiff means that the defendant did not make payment at all.

[34] It is not contended that the contested paragraphs in the plaintiff's plea do not disclose a defence at all, but it is contended that these paragraphs are vague and embarrassing. It appears to me that the requested information is not necessary for the defendant to plead further to the plaintiff's plea in reconvention. The facts stated by the plaintiff in its plea in reconvention are clear and set forth the grounds upon which the defendant's claim is resisted. If the defendant needs further clarity or particularity, it is entitled to request this information after the close of

pleadings in terms of Uniform rule 21(2) or may require the plaintiff to declare these documents in terms of Uniform rule 35.

[35] The issue of the ‘monthly reports as proof that work was done’, was introduced by the defendant for the first time in paragraph 6 of its exception. It was never pleaded in the defendant’s counterclaim nor in the plaintiff’s plea to the claim in reconvention. It is strange that the defendant wanted the plaintiff to produce monthly reports that were not in the parties’ pleadings and even excepted to the plaintiff’s plea for failing to list those monthly reports which were not pleaded in the pleadings.

Conclusion

[36] The defendant has a duty to persuade the court that the plaintiff’s plea is vague and embarrassing. The defendant has not shown that the plaintiff’s plea is vague, confusing or meaningless or that the plea is lacking in particularity, and therefore vague to such an extent that the defendant is embarrassed and prejudiced thereby.

Order

[37] Accordingly, the defendant’s exception is dismissed with costs.

MATHENJWA AJ

DATE OF HEARING : 13 April 2021

DATE OF JUDGMENT : 30 April 2021

FOR THE APPLICANT : W J Pietersen

Instructed by Mason Incorporated

FOR THE RESPONDENT: S Moodley

Instructed by Lalparsad Inc

c/o Carlos Miranda Attorney

