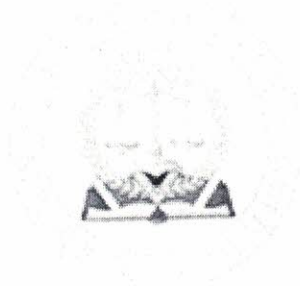


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 78461/2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
DATE 22/02/19	

[Handwritten signature]

In the matter between:

SETLABOSWANE
Plaintiff/Respondent
COOPERATIVE LIMITED

AGRICULTURAL

And
TEMONG MANAGEMENT CC

1ST Defendant

MEMBER OF THE EXECUTIVE COUNCIL
Defendant/Excipient
OF LIMPOPO DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT

2ND

J U D G M E N T

MOSOPA AJ

1. This is an exception taken against the Plaintiff's amended particulars of claim dated 04 April 2018 on the basis that such particulars of claim lacks the necessary averments to sustain a cause of action, by the Second Defendant.
2. This matter initially served before me on the 08th of October 2018, when I realized that the Second Defendant's heads of argument were not in the court file. The Second Defendant was at that stage represented by Mr Modisa who then produced a stamped heads of argument as a proof that same was served and filed. I then stood the matter down to the 11th of October 2018 for argument.
3. On the 11th of October 2018 the Second Defendant now represented by Mr Manala, at the commencement proceedings raised an application from the bar that the matter be transferred to the Limpopo Division, Polokwane, as the chosen address for the purpose of the agreement is in the Limpopo Province. Secondly, that the Second Defendant is the Member of the Executive Council of Limpopo Province and finally, that the matter pertains to a group of farmers who are all based in Limpopo Province. I ruled against such matter on the 11th of October 2018 with full reasons and allowed the parties to argue the application for exception.

LEGAL PRINCIPLE

4. Rule 23 (1) of the Uniform Rules of court provides as follows,
"23 (1) Where any pleadings is vague, 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 further that the party excepting shall within ten 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.

5. An exception is a legal objection to the opponents' pleading. If complaints of a defect inherent in the pleading; admitting for the moment that all allegation in a summons or plea are true, it asserts that even with such admissions the pleading does not disclose either a cause of action or a defence, as the case may be, it follows that where an exception is taken, the court must look at the pleading excepted as it stands, no facts outside those stated in the pleading can be brought into issue- except in the case of inconsistency and no reference may be made to any other document (see Erasmus; Superior Court Practice, Second Edition, Van Loggerenberg, Vol 2, D1- 293, D1 294).

6. Rule 18(4) of the Uniform Rules of court provides;

"Every pleading shall contain a clear and concise statement of the material facts upon which a pleader refer 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".

7. Rule 20 (2) of the Uniform Rules deserves mention and provides;

“The declaration shall set forth the nature of the claim, the conclusion of law which the Plaintiff shall be entitled to deduce from the facts stated therein, and a prayer for the relief claimed”.

8. In *Mckenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23, the following definition of “cause of action” was adopted by the Appellant Division, “every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved”.
9. In *Vermeulen v Goosen Valley Investments (Pty) Ltd* 2001 (3) SA 986 at 997 Marais JA stated “it is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it is shown that ex facie, the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law”.

FACTUAL BACKGROUND

10. The Plaintiff's particulars of claim avers that the Plaintiff and Defendant on or about the 17th of August 2018 at Setlaboswane entered into a written memorandum of agreement (“The Partnership Agreement”).
11. The material terms of the Partnership Agreement were inter alia;
 - a. That the Setlaboswane Irrigation Scheme consists of 98 farmers to produce potatoes and other cash crops, such as maize and wheat;

- b. The objectives of the Plaintiff with the appointment of the First Defendant was to operate the Setlaboswane irrigation Scheme in terms of the partnership agreement were to;
- c. Operate the irrigation scheme, as part of the project of this department, to its optimum potential capacity, on a profitable commercial basis;
- d. Train farmers (who were members of the Plaintiff) and transfer the required skills to empower them to operate the irrigation scheme themselves in the long term which included training in the areas of finance, quality control, marketing, management, operational, technical and business administration;
- e. Ensure that profit sharing formula arrangement was implemented among the First Defendant and Plaintiff, during the three year period under the partnership agreement;
- f. Comply with the implementation of the empowerment of the Department;
- g. The Department would remain involved in the management of the partnership at board level to ensure that the objectives of the partnership agreement were achieved, and;
- h. That the partnership will commence on the 17th of August 2008 and endure for a period of 3 years to expire on 17th of August 2011,subject to any prior termination.

THE EXCEPTION

12. It is trite that the onus is on the excipient to prove that the Plaintiff's amended particulars of claim are excipiable.

13. Mr Manala contended on behalf of the excipient that the Plaintiff is relying on the partnership agreement which was concluded between the Plaintiff and the First Defendant and no reference is made to the excipient. Furthermore the excipient is not a signatory to the partnership agreement.
14. Further that the memorandum agreement of agreement cannot be construed as giving rise to the following
- 14.1 Fiduciary relationship;
 - 14.2 Contractual obligation, and
 - 14.3 Statutory obligation to render the account on the part of the excipient
15. As a result the terms and conditions of the partnership agreement are not binding and enforceable on the excipient.
16. It was contended on behalf of the Plaintiff that the partnership agreement constitutes a tripartite agreement with the excipient exercising an oversight function in order to advance the project, as such the excipient remains in the management of the scheme.
17. Further that all issues raised by the excipient cannot be disposed off at exception proceedings but can be properly be dealt at trial stage.
18. I am alive to the fact that the excipient is not a signatory to the partnership agreement. However what is important is to look at the structure and nature of the partnership agreement. Paragraph 6.9 of the amended particulars of claim provides as follows "upon the establishment of the partnership and to

implementation of the partnership agreement, the partnership would form an integrated part of the Department (i.e. excipient)".

19. From the above, it is clear that even though the excipient is not a signatory to the partnership agreement it is given certain responsibilities in relation to how the scheme is to be implemented and operated and most importantly on overseeing the whole project. In my mind that in itself creates a fiduciary relationship.

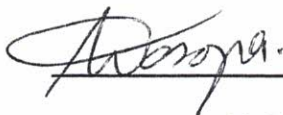
20. The plaintiff pleaded all this in its amended particulars of claim, and that's actual what the exception is all about, the court need only to look at the particulars of claim, when determining the exception, (see Baliso v Firsrand Bank Limited t/a Wesbank 2017 (1) SA 292 (CC) at 303 E).

21. I am in agreement with counsel on behalf of the Plaintiff that all issues raised by the excipient at this stage are matters that can be properly be dealt with at the trial stage. It is for this reason that this exception cannot succeed.

ORDER

22. I therefore make the following order;

1. The exception taken against the Plaintiff's amended particulars of claim is dismissed with costs.


M.J MOSOPA

ACTING JUDGE OF THE HIGH COURT

PRETORIA HIGH COURT

APPERANCES

For Excipient/Second Defendant: Adv Manala

Instructed by : State Attorney Pretoria

For the Respondent/Plaintiff: Adv H.P Van Nieuwenhuisen

Instructed by: Tshabalala Attorneys

Date of Hearing: 11 October 2018.

Date of Judgment: