

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 48438/2016

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	30/4/2019
E.M. KUBUSHI	DATE

In the matter between:

J K VORLAUFER & SONS (PTY) LTD
WALTER KARJOSEF VORLAUFER
BARBARA ANNE VORLAUFER
KAREN VORLAUFER

First Excipient/Defendant
Second Excipient/Defendant
Third Excipient/Defendant
Fourth Excipient/Defendant

and

MIKE HODGE

In re:

MIKE HODGE

and

J K VORLAUFER & SONS (PTY) LTD
WALTER KARJOSEF VORLAUFER
BARBARA ANNE VORLAUFER
KAREN VORLAUFER

First Excipient/Defendant
Second Excipient/Defendant
Third Excipient/Defendant
Fourth Excipient/Defendant



Respondent/Plaintiff

Respondent/Plaintiff

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] This is an exception raised by the defendants against the plaintiff's particulars of claim. The defendants' grounds of exception are categorised into two groups, namely, those that are said to render the plaintiff's particulars of claim excipiable due to lack of necessary averments to sustain a cause of action and those that are alleged to render the plaintiff's particulars of claim excipiable due to being vague and embarrassing.

[2] The test on an exception that the particulars of claim fail to disclose a cause of action, is said to be whether on all possible readings of the facts, no cause of action is made out.¹ In order to succeed with an exception that the particulars of claim fail to disclose a cause of action, a defendant must show that, on any reasonable construction, the particulars of claim disclose no cause of action. The duty rests on the defendant to establish that in all its possible meaning no cause of action is disclosed.² The defendant must also satisfy the court that the conclusion of law pleaded by the plaintiff cannot be supported by any reasonable interpretation of the particulars of claim and that it is bad in law.³

¹ Astral Operations v Nambitha Distributors (Pty) Ltd; Astral Operations Ltd v O'Farrell NO [2013] 4 All SA 598 (KZD) at para 4.

² Francis v Sharp 2004 (3) SA 230 (CPD) at 237D–E.

³ Trustees, BIR Fund v Break Through Investments CC 2008 (1) SA 67 (SCA) para 11 and Stewart v Botha 2008 (6) SA 310 (SCA) para 4.

[3] As regards the exception based on vagueness and embarrassment arising out of lack of particularity, the approach to be adopted was stated in *Francis v Sharp* above, as follows:⁴

"As to the exceptions on the ground that certain paragraphs in the particulars of claim were vague and embarrassing, the Court reiterated the approach to be adopted to an exception that a pleading is vague and embarrassing, namely that such exception should not be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged."

[4] For ease of reference I shall, in this judgment, continue to refer to the parties as cited in the particulars of claim.

BACKGROUND

[5] The summons, in this instance, was issued on 20 June 2016 and served on 7 July 2016. On 11 July 2016 the defendants entered an appearance to defend the matter.

[6] On 22 July 2017, the defendants, served the plaintiff with a notice in terms of uniform rule 35 (12) and (14) requiring to be furnished with numerous documents. The plaintiff is said to have replied comprehensively to the said notice and furnished the defendants with some of the requested documents.

[7] On 22 January 2018 the plaintiff served a notice of bar on the defendants. Instead of filing their plea, the defendants, on 29 January 2018, served the plaintiff with two processes, namely:

⁴ At 231F – G, 240E – H and 245F.

- 7.1 An exception that the plaintiff's particulars of claim lack averments to sustain a cause of action; and
- 7.2 A notice to remove the cause of complaint which allegedly rendered the plaintiff's particulars of claim vague and embarrassing.

Another notice of exception on the ground that the particulars of claim are vague and embarrassing was served on the plaintiff on 2 March 2018.

[8] Both notices of exception raised about sixteen grounds on which the defendants contend the plaintiff's particulars of claim are excipiable. But, in their heads of argument the defendants deal respectively with twenty grounds of exceptions.

THE ISSUE

[9] The issue, therefore, is whether the plaintiff's particulars of claim are excipiable either on the grounds that they lack necessary averments to sustain a cause of action and/or due to being vague and embarrassing rendering them susceptible to be set aside.

THE GENERAL APPROACH TO EXCEPTIONS

[10] The proper approach to be adopted in determining an exception is set out in the judgment in *Colonial Industries Ltd v Provincial Insurance Co Ltd*⁵ as follows:

"Now the form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed: its principal use is to raise and obtain speedy and economical decision of questions of law which are apparent on the face of the pleadings: it also serves as means of taking objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing. . . . save in the instance where an

⁵ 1920 CPD 627 at 630.

exception is taken for the purpose of raising a substantive question of law which have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed.”⁶

[11] Van Heerden J in *South African National Parks v Ras* ⁷ summed up the position as follows:

“The court should not look at a pleading with a magnifying glass of too high a power. It is the duty of the court when an exception is taken to a pleading first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is embarrassment which is real as a result of the faults in the pleading to which exception is taken. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment the exception should be dismissed.”

[12] In *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Co (South Africa) Ltd* ⁸ the main purpose of an exception was stated as, being to avoid the leading of unnecessary evidence at a trial.

[13] An exception complains of a defect inherent in the pleading: admitting for the moment that all the allegations in the summons are true, it asserts that even with such admission, the pleading is excipiable.⁹ The court should look at the pleading as it stands and no facts outside those stated in the pleading can be brought into issue. There can be no reference to any other document.¹⁰

⁶ *Lancino Financial Investments (Pty) & another v Benett & another* [2007] JOL 19653 (T) para 13.

⁷ 2002 (2) SA 737 (C) at 541J – 542A.

⁸ 2018 (3) SA 405 (SCA) para 9.

⁹ See *Makgae v SentraBoer (Koooperasie) Bpk* 1981 (4) SA 239 (T) at 244H – 245A.

¹⁰ See *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] 3 All SA 350 (A).

THE NATURE OF THE PLAINTIFF'S CLAIM

[14] At the outset I set out the premise that underlies the plaintiff's claim as set out in his particulars of claim. In essence the plaintiff's claim amounts to –

- 14.1 Repayment of the amount of R686 921, 38 (six hundred and eighty six thousand nine hundred and twenty one rand thirty eight cents) paid to the first defendant, as well as an amount of R750 000 (seven hundred and fifty thousand rand) being for damages suffered. The claim is based on an oral agreement entered into between the plaintiff and the first defendant. The terms of the said agreement are as set out in paragraphs 3.1 to 3.6 of the particulars of claim. The first defendant is said to have breached the agreement as is set out in paragraph 6 of the particulars of claim. As a result of the breach the plaintiff cancelled the agreement, as pleaded in paragraph 7.3 of the particulars of claim.
- 14.2 The Consumer Protection Act ("the CPA"), is said to apply to the agreement entered into between the parties. The allegation is that the provisions of the CPA support the plaintiff's common law claim as set out in paragraph 4 of the particulars of claim.
- 14.3 The joint and several liability of the second, third and fourth defendants as directors of the first defendant is founded upon the first defendant carrying on its business recklessly, *alternatively* with gross negligence, and with intent to defraud the plaintiff, *alternatively* for fraudulent purposes. The allegation is that the second, third and fourth defendants knowingly took part in such conduct and they, as a result, contravened their obligations as directors in terms of the Companies Act 71 of 2008 ("the new Companies Act"). The second, third and fourth defendants stand to be declared liable to the plaintiff in terms of s 424 (1) of the Companies Act 61 of 1973 ("the old Companies Act") for the amounts owing to the plaintiff by the first defendant. In addition, the second, third and fourth defendants are said to be liable to make payment to the plaintiff for the loss and damage suffered by the plaintiff as a result of the contraventions of the provisions of the new Companies Act in terms of s 218 (2) of thereof.

DISCUSSION

[15] I do not intend to deal, in this judgment, with each and every ground of exception as traversed by the defendants in their heads of argument but to address each ground raised in relation to each particular cause of action in the particulars of claim.

Breach of the Agreement:

[16] The defendants raise nine grounds of exception that the particulars of claim in this regard are excipiable due to lack of necessary averments to sustain a cause of action, namely, grounds of exception three, five, seven, eight, nine, ten, eleven, thirteen and nineteen.

[17] The complaint by the defendants in this regard is that the plaintiff failed in his particulars of claim to allege the necessary averments to sustain a cause of action in respect of:

- 17.1 the amount of R186 921, 38, which is in excess of the maximum restoration costs of R500 000 pleaded in paragraph 3.4 of the particulars of claim;
- 17.2 the terms of the plaintiff's obligations as set out in paragraph 5 of the particulars of claim and consequently, the basis from which such alleged obligations originated from.
- 17.3 the parts of the vehicle which were taken from it for restoration of other vehicles and the identity of the other vehicles entrusted to the first respondent by other consumers.
- 17.4 the spares alleged to have been fitted to the vehicle when first delivered to the first defendant as well as the value of such parts.

- 17.5 the identity of the services alleged to have not been rendered by the first defendant but invoiced, as well as, the true value of such services as invoiced.
- 17.6 the identity of the spares and/or parts allegedly not delivered or used, as well as, the value of such spares and/or parts as invoiced.
- 17.7 the basis on which the actions of the first defendant, which caused the plaintiff to assemble the chassis, engine and gearbox and other components of the plaintiff's vehicle in a dilapidated and non-functional condition, constitute a material breach or failure of duty by the first defendant.
- 17.8 how the conduct by the plaintiff himself in assembling the chassis, engine, gearbox and other components of the plaintiff's vehicle in a dilapidated and non-functionable manner could constitute a material breach of the alleged agreement which entitled him to cancel the agreement.
- 17.9 the failure to make the necessary averments that demand was made to any of the defendants and which entitles the plaintiff to claim *mora* interest on the basis of the agreement.

[18] There are also two grounds, namely the ground of exception one and two, which are said render the plaintiff's particulars of claim excipiable due to being vague and embarrassing, in the following manner:

- 18.1 The failure by the plaintiff to plead whether the allegations of conducting an oral agreement in paragraph 3.2 of the particulars of claim contains allegations of background or surrounding circumstances or whether the plaintiff pleads paragraph 3.2 as a material term of the alleged oral agreement.
- 18.2 The failure by the plaintiff to plead whether the allegations of the oral agreement in paragraphs 3.1 to 3.6 of the particulars of claim

constitutes the terms of the agreement or facts of background and surrounding circumstances.

[19] The paragraphs complained of, in this respect, are pleaded as follows in the plaintiff's particulars of claim:

"During or about September 2013, and at Johannesburg, Plaintiff, acting in person, and First Defendant, represented by Second Defendant, entered into an oral agreement in terms of which:

- 3.1 First Defendant would perform a restoration of Plaintiff's vintage replica 1938 model Jaguar SS 100;
- 3.2 The parties acknowledged that the vehicle had already been almost completely restored at the time, and First Defendant would merely attend to minor body work comprising sanding down of small nicks and dents, checking the gearbox and other mechanical parts, and fix what needed to be fixed to the vehicle which was in a running and complete intact condition, when handed to First Defendant;
- 3.3 The restoration would be completed within a reasonable time, and would be completed within a period of 18 months;
- 3.4 The restoration cost would have amounted to R500 000-00;
- 3.5 First Defendant would supply Plaintiff with a proper written quotation, indicating costs, and would during the restoration process keep Plaintiff abreast of services rendered and goods necessary to comply with First Defendant's obligation of restoration;
- 3.6 Plaintiff would make payment of invoices rendered by First Defendant relating to the restoration process from time to time."

[20] From the reading of the abovementioned paragraph it is clear that the subparagraph refers to the terms of the alleged oral agreement and that subparagraph 3.2 relates to background and surrounding circumstances. The averments as they stand sustain a valid cause of action. There is, also, no vagueness or embarrassment that the defendants are complaining about.

The Application of the CPA:

[21] The defendants raise two grounds of exception, grounds of exception four and fourteen, that this cause of action is excipiable due to lack of necessary averments to sustain a cause of action, in the failure to -

- 21.1 allege whether the services in respect of which it is alleged the CPA applies were to be rendered by the first respondent in terms of any agreement and the material terms of such agreement.
- 21.2 plead the details of the alleged common law obligations and their replacement of such common law principles by any statutory regulation of any particular subject.
- 21.3 aver whether the plaintiff's entitlement to the refund of the amount of R686 921, 38 flows from the CPA, the cancellation of the agreement or the common law principles.
- 21.4 take into account that the common law, to the extent that it may exist and be applicable to a particular subject, would be replaced, should any statutory regulation be promulgated on the subject.

[22] The defendants also raise another ground of exception in this regard, the sixth ground of exception, which they say render the plaintiff's particulars of claim excipiable due to being vague and embarrassing, in that the particulars of claim fail to -

- 22.1 allege whether the individual sub-paragraphs of paragraph 6 of the particulars of claim are obligations of the first defendant in terms of the alleged agreement or obligations of the first defendant in terms of CPA which is implied in the provisions of the alleged agreement.
- 22.2 aver that the provisions of the CPA are implied, and which provisions are implied in the alleged oral agreement.

[23] In paragraph 4 of the plaintiff's particulars of claim the following is pleaded:

"The agreement entered between the parties, and the services to be rendered by First Defendant fell within the ambit of the Consumer Protection Act, No 68 of 2008 ("the CPA"), and First Defendant was *inter alia* obliged . . ."

[24] From the reading of the said paragraph it is apparent that the plaintiff's claim does not flow from the provisions of the CPA *per se* but the allegation is that the agreement entered into by the parties and the services alleged to have been rendered by the first defendant fell within the ambit of the CPA.

[25] The purposes of the CPA are to promote and advance the social and economic welfare of consumers in South Africa by, amongst others, promoting fair business practices and protecting consumers from: unconscionable, unjust or otherwise improper trade practices and deceptive, misleading, unfair and fraudulent conduct.¹¹

[26] The allegation, therefore, is that, in terms of the oral agreement, the first defendant was obliged to comply with the requirements of the CPA as set out in the subparagraphs to paragraph 4 of the plaintiff's particulars of claim.¹² This, however, does not detract from the fact that the plaintiff's rights in terms of the common law are still applicable. This is so, because, in interpreting the CPA, no provision must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.¹³

[27] The plaintiff's contention in his heads of argument that the inclusion of the CPA in this regard is a *plus petitio*, the deletion of which will not result in the

¹¹ See section 3 (1) (c) and (d).

¹² Sections 19, 54 (b), (c) and (d).

¹³ See section 2 (10).

particulars of claim not disclosing a cause of action, makes sense. In my view, it can, also, not be said that the particulars of claim in this respect are vague and embarrassing. The subparagraphs in paragraph 4 set out, clearly, the provisions of the CPA on which the plaintiff relies and it is not necessary to have averred that the provisions are implied.

A claim for Damages

[28] In respect of the claim for damages, the defendants raise one ground of exception, the fifteenth ground of exception, that the particulars of claim are excipiable due to lack of necessary averments to sustain a cause of action, in that:

28.1 Having claimed a refund of the amount of R686 921-38 constituting the alleged amounts paid by the plaintiff to the first defendant, the plaintiff fails to allege on what basis he would be entitled to receive payment in the amount of R750 000 in respect of damages in respect of the same agreement.

[29] There is, also, another ground raised by the defendants which, according to the defendants, render the plaintiff's particulars of claim excipiable due to being vague and embarrassing, namely, the sixteenth ground of exception, in that it fails to—

29.1 allege on what basis the amount of R750 000 for damages is claimed, specifically whether or not the plaintiff has restored the vehicle.

29.2 set out how the sum of R750 000 is made up in contravention of uniform rule 18 (10).

[30] In support of his argument that the particulars of claim in this regard are not excipiable, the plaintiff referred to the judgments in *Baker v Probert*¹⁴ and *Inzalo Communications v Economic Value Accelerators*.¹⁵

[31] The plaintiff's claim for damages is valid on the face of it. Such a claim is characterised as 'a claim for repayment of an amount paid in respect of a defective or non-existent service, or a deficiency in breach of a contractual warranty, i.e. a claim for restitution of the plaintiff's performance, pursuant to the cancellation of the contract'.¹⁶ Claims of this nature are in certain circumstances allowed, where an aggrieved party may claim restitution against a defaulting co-contracting party post-cancellation.¹⁷ Restitution, in this regard, is referred to in the non-technical sense as identified by the court in *Probert*.¹⁸

[32] I do not think that the judgments the plaintiff refers to, on this point, are a proposition that he can claim for the return of the amount paid to the first defendant as well as claim damages on the basis of breach of contract. My understanding of the said judgments is that firstly, the two claims can be claimed separately or at the very least in the alternative; secondly, the amount claimed for damages must be equal to the amount expended by the plaintiff. In my view, the cases used by the plaintiff only establish an entitlement to restitution pursuant to defective contractual performance post-cancellation and nothing more.

[33] Read in isolation, I would not say that the particulars of claim in paragraph 9 lack necessary averments to disclose a cause of action. I would rather say that the

¹⁴ 1985 (3) SA 429 A.

Where a purchaser of a shareblock in a company made payment to the seller's agent in anticipation of the transfer thereof by the seller. The seller failed to deliver the share certificates, and the purchaser cancelled the contract on the ground of the defendant's breach. The seller's agent was placed in liquidation, and the purchaser claimed repayment of the purchase price from the seller. The Appellate Division accepted that the purchaser was entitled to the purchase price from the seller and that it was appropriate to classify the case as one for restitution.

¹⁵ 2008 (6) SA 87 WLD.

¹⁶ See *Inzalo* p99 paras 36 and 37.

¹⁷ See *Inzalo* p97A paras 30 and 36.

¹⁸ 1985 (3) SA 429 A.

averments contained in paragraph 9 read together with the averments in paragraphs 3 to 8 of the particulars of claim are contradictory, and if not pleaded in the alternative, destroys the plaintiff's cause of action. The said averments are, thus, patently vague and embarrassing and the defendants will be prejudiced if the averments are allowed to stand and they are obliged to plead thereto.

[34] In order for the plaintiff to sustain the two causes of action, that is, the claim for restitution repayment and the claim for damages, more particularity ought to have been given to the averments in paragraph 9 of the particulars of claim. Therefore, the failure by the plaintiff in his particulars of claim (paragraph 9 in particular) to allege on what basis the amount of R750 000 for damages is claimed, specifically whether or not the plaintiff has restored the vehicle; and to set out how the sum of R750 000 is made up in contravention of uniform rule 18 (10), makes the particulars of claim vague and embarrassing. This, strikes at the root of the formulation of the cause of action and its legal validity. The claim by the plaintiff of the amount of R750 000 for damages, in excess of the amount paid to the first defendant by the plaintiff for the services, confuses the averments even further. It is thus, necessary for the plaintiff to allege on what basis the amount of R750 000 is claimed for damages and/or how it is made up. The defendants will, indeed, be seriously prejudiced thereby.

[35] I must state, further, that it was not necessary for the plaintiff in the circumstances of this case to plead enrichment, as it was suggested by the defendants. A claim for restitution in this context has been held not (and cannot be) one for enrichment.¹⁹ Therefore to allege enrichment in such circumstances would only be to unnecessarily burden the pleadings and the evidence to be led at the trial. Contractual remedies (including restitution in the technical sense identified in *Probert*) lie where the contract is the source of the claim. It is only where the purported contract had no legal effect that the claim could be founded in an enrichment action.²⁰

¹⁹ See Inzalo p98 para 34.

²⁰ Inzalo p100 para 41.

[36] Hence, this ground of exception is well taken insofar as it relates to the restitution claim being sought together with the claim for damages.

The Third Cause of Action is in respect of the liability of the directors:

[37] The defendants raise one ground of exception that the particulars of claim are in this respect excipiable due to lack of necessary averments to sustain a cause of action, namely, the twelfth ground of exception, in that it fails to –

37.1 allege how the conduct by the first respondent amounted to the first respondent carrying on its business recklessly, *alternatively* with gross negligence and with the intent to defraud the plaintiff, *alternatively* for a fraudulent purpose.

[38] There are two further grounds raised by the defendants which according to the defendants render the plaintiff's particulars of claim excipiable due to being vague and embarrassing, namely, the seventeenth and eighteenth grounds of exception, in that the particulars of claim fail to –

38.1 aver when, where and how, by individual allegations relative to the second, third and fourth defendants, they allowed the first defendant to carry on its business recklessly, *alternatively* with gross negligence, and with intent to defraud the plaintiff, *alternatively* for fraudulent purposes.

38.2 specifically allege that the second, third and fourth defendants had knowledge of the conduct of the first respondent.

38.3 set out the provisions of the new Companies Act contravened by the defendants.

38.4 allege which components of section 218 (2) of the new Companies Act were breached by the second and/or third and/or fourth defendants.

[39] I am in agreement with the plaintiff's contention that the allegations in respect of the conduct of the first defendant are a conclusion of law and can never be part of the *facta probanda*. The facts referred to by the plaintiff in paragraph 10 of the particulars of claim justify such a conclusion of law.

CONCLUSION

[40] It is, therefore, my conclusion that when the particulars of claim are considered against the exceptions taken that the grounds of exception, except the sixteenth ground of exception,

- 40.1 do not attempt to raise a substantive question of law which may have the effect of settling the dispute between the parties; nor do they in any real sense bring an end to any distinct part of the case.
- 40.2 do not go to the root of the whole cause of action. They are merely directed at specific paragraphs in the particulars of claim.
- 40.3 do not establish vagueness in the sense of rendering the particulars of claim meaningless and capable of more than one meaning. The grounds of exception having failed to show vagueness and therefore embarrassment it cannot be said there is consequently embarrassment that may amount to prejudice.
- 40.4 amount to nothing more than lack of particularity which can be cured by the leading of evidence. The complaints, in essence, relate to *facta probantia* and cannot properly found an exception.

[41] As already stated, the exception as regard the sixteenth ground of exception has been well taken. I intend to give the plaintiff an opportunity to remove the cause of complaint and to amend the particulars of claim to provide clarity in relation to that ground of exception.

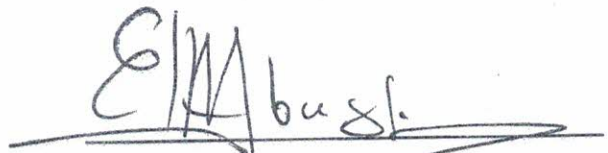
COSTS

[42] The plaintiff has been substantially successful herein and is thus entitled to the costs of suit. Both parties were respectively of the view that as a successful party they ought to be entitled to a punitive cost scale. I, however, do not think that a punitive scale of cost is appropriate in the circumstances of this matter. The plaintiff, is thus, entitled to the ordinary scale of costs, that is, costs on a party and party scale.

ORDER

[43] I make the following order

1. All the grounds of exception, except ground of exception 16, are dismissed.
2. Ground of exception 16 is upheld and the plaintiff is granted leave to amend the particulars of claim within fifteen (15) days of this order.
3. The defendants are ordered to pay the costs of this exception jointly and severally, the one paying the others to be absolved.


E.M. KUBUSHI
JUDGE OF THE HIGH COURT

Appearance:

Excipients/Defendants' Counsel
Excipients/Defendants' Attorneys

Respondent/Plaintiff's Counsel
Respondent/ Plaintiff's Attorneys

Date of hearing

Date of judgment

: Adv E. J. FERREIRA
: BARLETTS INCORPORATED
c/o SAVAGE JOOSTE & ADAMS
: Adv J.G. BERGENTHUIJN, SC
: CILLIERS & REYNERS ATTORNEYS
: 4 December 2018
: 30 April 2019