



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

Case No: 45197/18

In the matter between:

SANPROSA (PTY) LIMITED

Plaintiff / Respondent

and

IZAK SMOLLY PETERSEN N.O

1st Defendant / 1st Excipient

RIDWAAN ASMAL N.O

2nd Defendant / 2nd Excipient

BRIAN HILTON AZIZOLLAHOFF N.O

3rd Defendant / 3rd Excipient

JUJDEESHIN JUNKOON N.O

4th Defendant / 4th Excipient

JUDGMENT ON EXCEPTION

Introduction

[1] The plaintiff instituted action against the defendants in their capacity as trustees of the Dipula Property Investment Trust. The trust was a registered owner of an immovable property that had a rental lease agreement with Telkom for erection of antennae and equipment. For the sake of convenience I shall refer to the defendants as 'the Trust'.

[2] This immovable property was sold and transferred to the plaintiff on or about 27 March 2017.

[3] The dispute between the parties arises from rental money that Telkom was paying to the Trust, which became payable to the plaintiff on registration of the immovable property. In the particulars of claim, the plaintiff alleged that Telkom continued to pay rental to the Trust, and that it was entitled to this money for certain specified periods being;

[3.1] Its pro rata share for the amount that Telkom paid as rental for the period from 27 March 2014 to 31 October 2014.

[3.2] The rental amounts that Telkom paid to the Trust in error on various dates from 1 November 2014 to 1 November 2017.

[4] The plaintiff contends that the Trust failed to disclose these payments and to repay it to the plaintiff but retained the money under circumstances where it was not entitled to it as it was either due or owing to the Trust but to it.

[5] The Trust is alleged to have;

(a) admitted liability to the plaintiff in writing for payment of the rental amounts that Telkom paid to it for the period 1 November 2014 to 1 November 2017 and undertook to repay it to the plaintiff,

(b) denied receipt of rental for the period of 1 November to 31 October 2014 and;

(c) admitted liability in writing for the payment of the pro rata annual rental for the period 27 March 2014 to 31 October 2014 that was paid to it in error by Telkom. It undertook to repay it to the plaintiff.

The exception and submissions

[6] After giving notice to the plaintiff in terms of Rule 23 to remove a cause of complaint, and the plaintiff having failed to do so, the Trust excepted to the plaintiff's particulars of claim on four grounds.

Ground 1

[7] The plaintiff is alleged to have no cause of action against the Trust because, so the argument goes, it is Telkom and not the plaintiff that has been enriched. Therefore, the plaintiff lacks locus standi to institute a claim against the Trust. The plaintiff's claim is against Telkom and the Trust may remain liable to Telkom for the amounts by which it was enriched.

The alternative basis for the exception in this regard is that the particulars of claim are vague and embarrassing as the Trust is not able to ascertain who was impoverished and whether Telkom's liability to the plaintiff has been extinguished.

[8] In their heads of argument, the excipients contend that the plaintiff's claim is based on an exception, being either the *condictio indebiti* or *condictio sine causa* and it has failed to meet the requirements for both.

[9] With reference to authorities, the Trust contend that the requirements that the plaintiff was supposed to meet for a claim based on *condictio indebiti* are that the payment was made in the reasonable but mistaken belief that it was owing, that there was no obligation to pay and the error was reasonable.

[10] Under these circumstances, the Trust argued, it is Telkom who can institute a claim since it made the payment, not the plaintiff.

[11] The requirements for *condictio sine causa* are;

- (a) receipt of the money or goods to which the plaintiff is entitled,
- (b) without a valid cause for such receipt ,
- (c) enrichment of the recipient at the expense of the plaintiff, and ;
- (d) impoverishment of the plaintiff.

[12] The Trust contends that Telkom became the plaintiff's debtor by cession and it was aware of such when it paid the rental amounts to it. Telkom remains liable to the plaintiff, and having paid the Trust in error, it has a claim against the Trust based on *condictio indebiti*.

[13] The plaintiff's answer to the plaintiff's submissions is that it has pleaded its claim properly and all the elements of *condictio indebiti* have clearly been set out.

Ground 2

[14] The Trust contends that its letters that were addressed to the plaintiff cannot be interpreted as admission of liability but merely as an indication that the amounts were received and that there must be an accounting exercise. These letters do not set out a cause of action, in the alternative, the particulars of claim in this regard are vague and embarrassing because the Trust is not able to ascertain whether the plaintiff alleges that the letters constitute an acknowledgement of liability, whether it has accepted the adjustment of the account and to what extent the Trust is liable to the plaintiff.

[15] The plaintiff's submissions with regard to this ground of exception is that it amounts to an attack on the merits of the claim, which is not what an exception should be about. The Trust must file a plea and plead the defence

that the letters do not amount to an admission of liability if that is what is being contended.

Ground 3

[16] The particulars of claim with regard to the claim for payment of *pro rata* rental amounts does not disclose a cause of action because the plaintiff has failed to set out the terms and conditions of the agreement of sale and particularly the basis for entitlement of amounts received by the Trust before the agreement was concluded and prior to transfer of the property. In the alternative, it is alleged that the particulars of claim are vague and embarrassing because the Trust is unable to ascertain whether the agreement deals with amounts received prior to the sale agreement, the terms of the agreement and how the purchase price was calculated with reference to the future rental amounts.

[17] The plaintiff's submission on this ground of exception is that its claim is based on enrichment, and not on the agreement of sale.

Ground 4

[18] The plaintiff has not set out any cause of action for the claim of interest at the rate of 10,25% per annum as no agreement in this regard is alleged, and furthermore, whether the Trust was placed in mora on any of the dates on which the claim for interest is based. In the alternative, the particulars of claim are vague and embarrassing for the same reasons.

[18.1] The plaintiff submitted that the interest rates do not render a claim excipiable and that it was never under an obligation to place the Trust in mora.

Legal principles on exceptions

[19] Rule 18(4) of the Uniform Rules of Court provides as follows:

"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."

[20] Ambiguity on its own is not sufficient. There must be evidence that the opposing party will be seriously prejudiced if the relevant portions in the declaration are allowed to stand. The vagueness must relate to the cause of action. As stated in **Jowell v Bramwell – Jones and Others 1998(1) SA 836 (W) at 905**, the question is whether the exception goes to the heart of the claim, and if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet, and should he find that an exception on any ground fails, to then ascertain in the second place whether the particulars identified by the defendant are strictly necessary in order to plead and, if so, whether the material facts are unequivocally set out.

[21] Rule 18(6) of the Uniform Rules of Court provides as follows:

"A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading".

[22] In the matter of Trope and Others v South African Reserve Bank¹, Macreath J considered the meaning of "vague and embarrassing" in the context of exceptions and the nature of the enquiry that the court should undertake.

"No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading.

The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law.

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 (Quinlan v MacGregor 1960 (4) SA 383 (D) at 393E-H). As to whether there is prejudice, the ability of the Excipient to produce an exception-proof plea is not the only, nor indeed the most important, test - see the remarks of Conradie J in Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated.

Thus it may be possible to plead to particulars of claim that can be read in any one of a number of ways by simply denying the allegations made;

¹ (641/91) ZASCA 54; 1993 (3) SA 264 (AD); [1993] 2 ALL SA 278 (a) (31 March 1993)

likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing - see *Parow Lands (Pty) Ltd v Schneider* 1952 (1) SA 150 (SWA) at 152F-G and the authorities there cited.

It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading."

[23] It is also important to note that for purposes of adjudicating on an exception, the court must look at the pleading excepted to as it stands.

Minister of Safety and Security v Hamilton 2001 (3) SA 50 (SCA)

[24] It is now trite that non-joinder can be raised by way of exception.

Ramatshimbila v Phaswana (199 /13) [2014] ZASCA 117 (19 September 2014)

Discussion and conclusion

[25] Applying the legal principles on the facts of this matter, it became clear during oral submissions that there was no merit in the second, third and fourth grounds of exception and that the only issue that had substance and remained for adjudication was whether the plaintiff had *locus standi* to institute a claim against the Trust under circumstances where the money was paid by Telkom. This is the first ground of exception.

[26] In his heads of argument, counsel for the plaintiff submitted that it has pleaded the claim based on '*condictio sine cause*' and referred to the relevant paragraphs in the particulars of claim.

[27] Counsel before me referred to the Eight Edition of LTC Harm's 'Amler's Precedents of Pleadings' to substantiate their submissions with regard to the necessary averments to sustain a cause of action for a claim based on *condictio indebiti* or *condictio sine causa*.

[28] The copy of this book that is in my chambers is outdated. I am indebted to counsel for making available the latest edition. I have already referred to the necessary averments in paragraph [11] of this judgment above.

[29] Under the subheading '*Relationship with condictio indebiti*', the learned author stated as follows:

"Although the condictio sine causa may be brought when the condictio indebiti would be inapplicable it is said not to be an alternative to the latter. The condictio sine causa may be applied when, for example, an executor pays to A a legacy belonging to B. B is entitled to recover from A irrespective of an excusable or other error by the executor"

[30] I enquired from the both counsel whether this was still authority or whether there has been any development in the law with regard to this issue.

[31] It was clear that both counsel had not considered what LTC Harms had stated in the paragraph I have quoted above, and as such they were not prepared to address me on the issue.

[32] I allowed the parties an opportunity to look up the authorities and to revert to me. I adjourned the hearing for this purpose, with an understanding that I would give judgment on receipt of their supplementary submissions.

[33] Later that afternoon counsel for the Trust, Mr. Aucamp sent an email to my Clerk and requested her to advise me that he had a look "*at the issue under consideration, and it appears to me that the condictio sine causa is*

indeed available to the plaintiff to pursue its action against the Trust directly."

He did not file any supplementary submissions or refer to authorities.

[34] I have not received any supplementary submissions from counsel for the plaintiff either.

[35] It is correct that the particulars of claim do cover the necessary averments for the claim based on *condictio sine causa*, however, the complaint raised in the exception relates to the legal standing of the plaintiff to institute the action in view of the fact that the payment was made by Telkom.

[36] Objections of non-joinder and locus standi are normally raised as a special plea, however, it is trite that if the facts giving rise to the objection appear in the summons, as in the matter before me, the defendant is entitled to except on the basis that no cause of action is disclosed. (Erasmus: Superior Court Practice (second Edition, volume 2, Van Loggerenberg) at D1-305 and the authorities cited therein, one of which is Gallo Africa LTD and Others v Sting Music (Pty) LTD and Others.

[37] My view on the issue is that the remaining ground of exception question must be decided in the context of the legal principles regarding what constitutes a cause of action. The enquiry is a factual one.

[38] The words "cause of action" were described as follows in McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16;

"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the 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."

[39] The cause of action must have been in existence at the time of issue of

the summons. In Philotex (Pty) Ltd and Others v Snyman and Others 1994

(1) SA 710 TPD at 715 D-G Van Dijkhorst J stated amongst others the following the following in this regard:

"The general approach in this Division has for many decades been that a cause of action should exist at the time of institution of action..."

[40] The excipient, in order to succeed, has a duty to persuade the court that upon every interpretation that the pleading is based, no cause of action or defence whatsoever is disclosed. Theunissen v Transvaalse Lewendehawe Koop Bpk 1988 (2) SA 493 (A)

[41] In terms of Rule 20(2), a declaration is required to set forth the nature of the claim and the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated. A declaration is excipiable if it lacks averments that are necessary to sustain an action. This requirement is equally applicable to particulars of claim.

[42] The facts pertaining to the circumstances under which the payment was made is what ultimately gives rise to the cause of action that would entitle anyone of them to institute action against the other. The fact that I have already rejected the other grounds of exception makes it even more obvious that there is no merit in the first ground of exception because the cause of action is derived from all those facts, which are common cause between the parties.

[43] Whether or not a plaintiff has the necessary locus standi is a factual enquiry. I am satisfied, under the circumstances, that there is no merit in the first ground of exception, and it is accordingly rejected.

Order,

[44] Under the circumstances, the defendant's exception is dismissed with costs.



TAN Makhuvele

Judge of the High Court

Appearances

Exciplents (Defendants in the main action): Advocate S Aucamp

(Hheads of argument drafted by

Adv. JG Dobie)

instructed by:

Reaan Swanepoel Attorneys

c/o Petzer Du Toit & Ramulifho

Hatfield

Pretoria

Respondent (Plaintiff in the main action): Advocate J de Beer

Instructed by:

Roestoff & Krause Attorneys

Hazelwood

Pretoria

Heard on: 14 March 2019.

Judgment delivered on: 21 May 2019.