



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES / NO
Of Interest to other Judges:	YES / NO
Circulate to Magistrates:	YES / NO

Case no: 3778/2017

In the matter between:

**MEC: DEPARTMENT OF PUBLIC WORKS &
INFRASTRUCTURE, FREE STATE PROVINCE** Plaintiff/Respondent

and

TUSCALOOSA 21 (PTY) LTD Defendant/Excipient

CORAM: MOROBANE, AJ

JUDGMENT: MOROBANE, AJ

HEARD ON: 17 MAY 2019

DELIVERED ON: 27 JUNE 2019

- [1] The defendant noted an exception against the plaintiff's amended particulars of claim dated 25 September 2018 on the grounds that they do not sustain a cause of action, alternatively, are vague and embarrassing. This is the fifth exception to be noted and it is opposed by the plaintiff.

- [2] On 16 October 2018 the defendant filed a notice in terms of Rule 23(1) notifying the plaintiff of its intention to except against his amended particulars of claim. Several causes of complaint, as more fully discussed below, were raised as the grounds upon which the exception is based. The plaintiff was invited to remove the cause of complaint within the prescribed period, but failed to do so. As a result, the exception was enrolled for hearing. In his prayers, the defendant seeks an order upholding the exception and for the dismissal of the action with costs.
- [3] In terms of the Uniform Rules of Court relating to the pleadings generally, Rule 18(4) stipulates 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. A party is bound to the issues he raised in the notice of exception. Consequently, the court will not entertain any issue which was not raised when the notice of exception was filed.
- [4] In ***McKelvey v Cowan NO***¹ the court considered exception to the pleading and stated that: 'It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.'

¹ *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-E.

- [5] In ***McKenzie v Farmers' Co-operative Meat Industries Ltd***² cause of action was defined as:

'...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.'

- [6] The excipient has the duty to persuade the Court that, upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed. In ***Trustees, BIR Fund v Break Through Investment CC***³ the court stated that:

'If an alternative interpretation is available, the court will not accept a meaning which would lead to absurd practical and commercial consequences.'

- [7] The defendant's main contention is that the plaintiff's amended particulars of claim does not sustain a course of action. On the contrary, plaintiff pleaded that its cause of action is premised on unjustified enrichment and that the necessary averments to sustain such a cause of action have been pleaded and properly set out. The plaintiff's particulars of claim must assert the essential allegations based on unjustified enrichment. That is, the enrichment of the defendant; the corresponding impoverishment of the plaintiff; a causal link between the defendant's enrichment

² *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23

³ *Trustees, Bus Industry Restructuring Fund v Break Through Investments and Others CC* 2008 (1) SA 67 (SCA) at 73E

and the plaintiff's impoverishment; and that the enrichment must be unjustified or *sine causa*.

- [8] In the alternative, the defendant relied on the following grounds as set out in the notice:

Plaintiff's *locus standi* and acting as an agent

- [9] The defendant alleged that the plaintiff has no *locus standi in iudicio*, but the department of Cooperative Governance and Traditional Affairs ("COGTA"). It further alleged that the plaintiff acted as an agent for and on behalf of other Government Departments in the Free State for acquiring and providing accommodation and property management services. The plaintiff is a department of the Provincial Government of the Free State and, according to schedule 'B, the 'lettable' space shows that it was occupied by another department of COGTA. Upon perusal of the lease agreement, it is clear that the plaintiff is the lessee and/or tenant and also a party to the agreement. That is: Free State Provincial Government (Department of Public Works and Rural Development). The grounds relied upon for exception have no basis and are dismissed.

Express and tacit terms of the agreement

- [10] The defendant avers that at paragraph 4 of the amended particulars of claim, the plaintiff, *inter alia*, relies on tacit terms of the lease agreement. That the tacit terms relied upon by the plaintiff are contradictory to his plea in paragraph 4.9 thereof.

However, the defendant failed to indicate which alleged tacit terms are in contradiction to the express terms of the agreement. Upon perusal of the amended particulars of claim, the tacit terms alleged by the plaintiff are in fact contained in the lease agreement. Therefore, there is no contradiction and this ground of exception must fail.

[11] The defendant alleged further that the plaintiff's reliance on any agreement entered into between the parties regarding the occupation of the premises and the payment of rentals which 'were due' prior to the signing of the lease agreement on 20 May 2009, do not sustain the cause of action. On proper interpretation of clause 12.4 under the heading: Occupation, the plaintiff would have no right of occupation and no claim to the existence of tenancy *until* the lease agreement is signed by both parties. Accordingly, the terms of the lease were encapsulated in the agreement which is binding on both parties. The parties agreed that the period of lease commenced on 1 June 2008 to 30 May 2014. Therefore, the grounds relied upon by the defendant in regard to the occupation of the premises and the rentals paid prior to signing the agreement should be dismissed.

[12] As regards the plaintiff's failure to comply with the provisions of Rule 18(6), this ground of complaint must fail since the relevant part of the lease agreement was attached to the plaintiff's particulars of claim. In ***Kudu Granite Operations v Caterna Ltd***,⁴ the contractual provisions are largely irrelevant in an action

⁴ *Kudu Granite Operations(Pty) Ltd v Caterna Limited* [2003] 3 All SA 1 (SCA) at para 15

premised on unjust enrichment. On that note, the ground of exception raised herein must be dismissed.

[13] In ***Vermeulen v Goose Valley Investment (Pty) Ltd***⁵ the court 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.”

[14] In my view, the allegations made by the plaintiff in his amended particulars of claim can sustain his claim and are neither vague nor embarrassing. Pleadings must be read as a whole and no paragraph can be read in isolation.⁶ The plaintiff’s amended particulars of claim are not excipiable and the grounds of exception noted by the defendant ought to fail under the circumstance.

[15] I accordingly make the following order:

1. The exception is dismissed with costs.

V.M. MOROBANE, AJ

⁵ *Vermeulen v Goose Valley Investment (Pty) Ltd* 2001 (3) SA 986 (SCA) at 997A-B.

⁶ Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa*, 5th Ed. Vol 1 at 634-638

On behalf of the excipient:	Adv. AJR van Rhyn SC Instructed by: Rosendorff Reitz Barry BLOEMFONTEIN
On behalf of the respondent:	Adv LT Sibeko SC, with him Adv DR Thompson Instructed by: State Attorney BLOEMFONTEIN