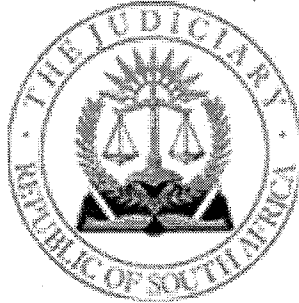


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 33426/2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
7/9/2018 DATE	
 SIGNATURE	

In the matter between:

WIN TWICE PROPERTIES (PTY) LTD

Plaintiff

and

**CAPITULO ENTERTAINMENT (PTY) LTD
t/a GALAXY WORLD**

First Defendant

WOLF-DRIETRICH FRITZ SEITZ

Second Defendant

LESLIE COHEN

Third Defendant

J U D G M E N T

MAHALELO, J:

[1] The defendants brought an exception against the plaintiff's particulars of claim on the basis that same is vague and embarrassing alternatively lacks

averments which are necessary to sustain a cause of action. The plaintiff's claim is for damages for the breach of a written lease agreement ("*the lease agreement*"). The exception consists of four grounds all taken as to vagueness and embarrassment alternatively, on a failure to disclose a cause of action.

THE LAW

[2] It is a basic principle that particulars of claim should be so phrased that the defendant may reasonably and fairly be required to plead thereto. It is also trite that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not to be taken by surprise. Pleadings must therefore be lucid, logical, in an intelligible form and the cause of action must appear clearly from the factual allegations made.

[3] A pleading may be vague if it fails to provide the degree of detail necessary in a particular case properly to inform the other party of the case being advanced.¹ The typical prejudice which justifies an exception is if allegations in the particulars of claim are such that the defendant is unable to plead properly.²

[3] In *Inzinger v Hofmeyr and Others*³ it was said that:

¹ *Lockhat v Minister of Interior* 1960 (3) SA 765 (D).

² *Lockhat supra*.

³ (7575/2010) [2010] ZAGPJHC 104 (4 November 2010) at paras 4 and 5.

- "4. *An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. It is not directed at a particular paragraph within a cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing. As was stated in Jowell v Bramwell-Jones and Others 1998 (1) SA 83 (W) at 905E-H:*

'I must first ask 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 ...'

Vagueness amounting to embarrassment and embarrassment in turn resulting in prejudice must be shown. Vagueness would invariably be caused by a defect or incompleteness in the formulation and is therefore not limited to an absence of the necessary allegations but also extends to the way in which it is formulated. An exception will not be allowed, even if it is vague and embarrassing unless the excipient will be seriously prejudiced if compelled to plead against which the objection lies."

[4] The evaluation of prejudice is a factual enquiry, and is a question of degree. The decision must necessarily be influenced by the nature of the allegations, their content, the nature of the claim and the relationship between the parties.⁴

[5] In *Jowell v Bramwell-Jones* the court referred to the following general principles insofar as exceptions are concerned:

- "(a) minor blemishes are irrelevant,*
- (b) pleadings must be read as a whole, no paragraph can be read in isolation,*
- (c) a distinction must be drawn between the facta probanda, or primary factual allegations which every plaintiff must make, and*

⁴ *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W).

the facta probantia, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence,

- (d) *only facts need be pleaded, conclusions of law need not be pleaded,*
- (e) *bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them implied allegations and the pleading must be so read: ..."*

[6] As to pleadings disclosing no cause of action Griesel J stated in *Frank v Premier Hangers CC*⁵ that:

"[11] In order to succeed in its exception, the plaintiff has the onus to persuade the court that, upon every interpretation which the defendant's plea and counterclaim can reasonably bear, no defence or cause of action is disclosed. Failing this, the exception ought not to be upheld."

[7] In *Vermeulen v Goose Valley Investments (Pty) Ltd*⁶ Marais JA stated as follows at para [7] page 997:

"[7] It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be 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."

⁵ 2008 (3) SA 594 (C).

⁶ 2001 (3) SA 986 (SCA).

FIRST GROUND OF EXCEPTION

[8] The plaintiff's cause of action is based on the alleged breach of a term of the lease agreement. In paragraph 12 of plaintiff's particulars of claim the plaintiff alleges that the first defendant "*failed to deliver the leased premises to the plaintiff in the same good order and condition as it existed at the beneficial occupation date and failed to reinstate the leased premises on the vacating of the premises, as set out in Annexure E to the Lease Agreement and also as set out in clause 12.2.7 of the Lease*".

[9] The defendants 'contend that the plaintiff failed to set out any details pertaining to the first defendant's alleged breach; including but not limited to the manner in which the leased premises had not been restored in the same good order and condition as existed at the beneficial occupation date and the manner in which the first defendant failed to reinstate the leased premises on vacating thereof. It is trite that a lessor who claims damages on the basis of the lessee's failure to return the leased premises in the condition in which it was delivered must show that the leased property has become damaged during the period of the lessee's tenancy.⁷ In my view paragraph 12 of the plaintiff's particulars of claim contains a breach relied upon by the plaintiff. Therefore, the breach/es must be pleaded with clarity and it should not be for the defendant to analyse the annexures to the particulars of claim to identify the factual basis for the conclusions pleaded in paragraph 12. The defendants are embarrassed as they cannot ascertain the facts relied upon,

⁷ *Nel v Dobie* 1966 (3) SA 352 (N).

from the pleading. The defendants are accordingly prejudiced in pleading thereto. I thus find that the allegations pleaded in paragraph 12 of plaintiff's particulars of claim are vague and embarrassing to the extent referred to herein.

SECOND GROUND OF EXCEPTION

[10] The second ground of exception reads as follows:

- "2.1 *The plaintiff avers in paragraph 13 that it elected to have the first defendant remove the ceiling which the defendant failed to do.*
- 2.2 *The plaintiff does not identify which defendant failed to remove the ceiling.*
- 2.3 *The plaintiff does not specify when it elected to have the first defendant remove the ceiling.*
- 2.4 *The plaintiff does not specify how it elected to have the first defendant remove the ceiling.*
- 2.5 *The plaintiff does not specify where it elected to have the first defendant remove the ceiling.*
- 2.6 *The plaintiff does not specify whether this election was oral or in writing, when it elected to have the first defendant remove the ceiling.*
- 2.7 *If this election was in writing, the plaintiff failed to attach a copy of such writing making the aforesaid election.*
- 2.8 *The plaintiff makes reference to this election in paragraph 13 of its particulars of claim in circumstances where annexure D makes reference to the obligation on the part of the plaintiff to discuss and confirm any issues pertaining to the ceilings.*
- 2.9 *In the circumstances the election relied upon by the plaintiff is not borne out by the necessary clause in the agreement which requires discussion and confirmation."*

[11] There is merit in this exception. It is no defence to say that the lack of particularity will be cured by requesting further particulars for purposes of trial. A defendant is obliged to admit, deny or confess and avoid the averments made by the plaintiff in its particulars of claim. The plaintiff has supplied insufficient particulars so that paragraph 13 is vague and embarrassing and prejudice the defendants in so far as they will be unable to plead.

THIRD GROUND OF EXCEPTION

[12] The plaintiff in paragraph 14 of its particulars of claim makes reference to "*occupation date*". The first defendant contends that its obligation in terms of clause 12.2.7 of the Lease Agreement is to restore the leased premises to the plaintiff in the same good order and condition as they were at the beneficial occupation date and not simply the occupation date. There is no merit in this exception. Reading the pleading as a whole it becomes clear that what is alleged in paragraph 14 is that the first defendant failed to restore the leased premises in the same good order and condition as they were at the beneficial occupation date. The plaintiff will have to lead evidence at the trial to clarify the correct terms of the Lease Agreement. This ground of exception is accordingly dismissed.

FOURTH GROUND OF EXCEPTION

[13] The plaintiff in paragraph 15 avers that it suffered damages in the sum of R374 591.65 in that it had to restore and reinstate the premises to the same good order and condition as existed at the occupation date. The plaintiff sets out the manner in which the amount is calculated. In clause 12.2.7 of the Lease Agreement, the first defendant's obligation is to make payment of the reasonable costs of restoring the leased premises to the same condition in which they were at beneficial occupation date. The first defendant contends that the plaintiff failed to aver that the damages claimed constitute reasonable costs of restoring the leased premises. Further that in the absence of allegations by the plaintiff linking the breach to the loss with sufficient particularity, the plaintiff has failed to plead a viable cause of action.

[14] This ground of exception is linked to the first ground in that the plaintiff failed to plead with sufficient particularity the breach relied upon. In my view the plaintiff has also failed to link the alleged breach to the alleged loss or damages suffered. I find the pleading to be vague and embarrassing to the extent of causing prejudice on the defendants. As to the reasonable costs, the plaintiff has pleaded the actual costs of damages it allegedly suffered. The reasonableness of the damages claimed is a matter for evidence to be led at trial.

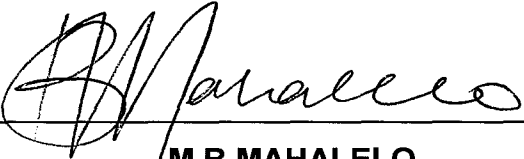
ORDER

[15] In the result:

15.1 The exception is upheld in respect of paragraphs 12, 13 and 15 of the plaintiff's particulars of claim and those paragraphs are hereby struck out.

15.2 The plaintiff is granted leave to amend its particulars of claim within 15 days of this order, if so advised.

15.3 The plaintiff is to pay the costs of the exception.



M B MAHALELO
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

For Excipient/Defendant:	Adv MacManus
For Respondent/Plaintiff:	Adv A D Schluep
Date heard on:	15 June 2018
Judgment delivered:	07 September 2018