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 number: 1324/2016

In the matter between:

ABSA BANK LIMITED Plaintiff

and

JACO PELZER MOCKE Defendant

JUDGMENT BY: SNELLENBURG, AJ

HEARD ON: 19 MAY 2017

DELIVERED ON: 15 JUNE 2017

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[1] This is an exception taken against the plaintiff's particulars of claim on the basis that it is vague and embarrassing.

[2] The object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise.

Pleadings must therefore be lucid and logical and in an intelligible form and the cause of action or defence must clearly appear from the factual allegations made. The particulars of claim should be so phrased that the defendant may reasonably and fairly be required to plead thereto.[1] In the famous judgment by Grosskopf, JA in **Trope v South African Reserve Bank and Another and Two Other Cases** 1993 (3) SA 264 (A) at 273A-B, the appellate Judge articulated the requirement as follows:

> "It is trite that a party has to plead - with sufficient clarity and particularity - the material facts upon which he relied for the conclusion of law he wishes the Court to draw from those facts (Mabaso v Felix 1981 (3) SA 865 (A) at 875A-H; Rule 18(4)). It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it. (Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 792J-793G.)"

But as explained in **Jowell v Bramwell-Jones and Others** 1998 (1) SA 836 (W) at 913B-G:

> ". . . (T)he plaintiff is required to furnish an outline of its case. This does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements."

[1] **Trope v South African Reserve Bank and Another and Two Other Cases** 1992 (3) SA 208 (T) at 210G - 211E.

It is therefore incumbent upon a plaintiff to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in an intelligible and lucid form and which allows the defendant to plead to.[2]

[3] An exception on the basis that the pleading is vague and embarrassing strikes at the formulation of the claim, not the validity of the cause of action. The allegations in the pleading that forms the subject of the exception are accepted to be correct for purposes of adjudicating the exception. Although a cause of action appears from the pleading, the objection is aimed at some defect or incompleteness in the manner in which the claim is set out which results in embarrassment to the defendant.[3] The vague and embarrassing exception however relates to whole cause of action, not a specific or particular paragraph within a cause of action.[4] When an exception is taken on the ground that the pleading is vague and embarrassing, the consideration that courts should deal with the exception sensibly and not in over-technical manner does not apply, because an exception may be taken to protect oneself against embarrassment.[5] The vagueness must however go to the root of the matter and save for an instance where the exception is taken for purpose of raising a substantive question of law which may have the effect of a the dispute between parties, an excipient should make

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[2] **Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd** 2006 (2) SA 25 (T) para 18.

[3] **Trope v South African Reserve Bank** 1993 (3) SA 264 (A) at 268F; **Lockhat and Others v Minister of the Interior** 1960 (3) SA 765 (D) at 777E;

[4] **Jowell v Bramwell-Jones and Others** 1998 (1) SA 836 (W) at 899G.

[5] **General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd** 1944 AD at 454; **Wilson v South African Railways and Harbours** 1981 (3) SA 1016 (C) at 1019C.

out very strong case before he should be allowed to succeed. The excipient must therefore satisfy the court that it would be seriously prejudiced if the offending pleading were allowed to stand.[6]

[4] Where the excipient relies on the ground that the pleading is vague and embarrassing the enquiry involves a two-fold consideration, namely whether the pleading lacks particularity to the extent that it is vague and, if so, whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced.[7] In **Trope** *supra* the court held that the ultimate test is still whether the pleading complies with the requirements of Rule 18(4).

[5] There is one further relevant requirement, namely the excipient must set out lucidly and with the necessary particularity the grounds of complaint in its Rule 23(1) notice to cure and, if the matter remains unresolved, thereafter in the exception. The exception is a pleading and as such also subject to the requirements of Rule 18(4) and susceptible to an exception if it lacks particularity and is vague and embarrassing. The notice to cure in terms of Rule 23(1) should be formulated with care to advise the other party properly of the nature and grounds of the complaint he is called upon to remedy. Failure to properly advise the other party in the Rule 23(1) notice of the cause of complaint defeats the very purpose that Rule 23(1) seeks to achieve, namely an opportunity to remove or remedy the cause of complaint.

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[6] **Francis v Sharp and Others** 2004 (3) SA 230 (C).

[7] **Trope v South African Reserve Bank** 1993 (3) SA 264 (A) at 268F; **Quinlan v F McGregor** 1960 (4) SA 383 (D) at 393E – H.

[6] Rule 18, in relevant parts, reads:

> "(4) 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.
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> (6) 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."

[7] Where a pleading does not comply with the provisions of rule 18 the other party has the option to either proceed in terms of Rule 30 or Rule 23.[8]

[8] The plaintiff is a commercial bank. It relies on two separate causes of action in its particulars of claim both stemming from written agreements alleged to have been concluded with the defendant. The plaintiff already amended its particulars of claim pursuant to a Rule 23(1) notice to cure by the defendant. Subsequent to the amendment being effected the defendant, when given notice in terms of Rule 26, served the Rule 23(1) notice to cure which lead to this exception.

[8] **Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen** 1992 (4) SA 466 (W).

[9] It will be beneficial to first identify the complaints and then evaluate the formulation of the plaintiff's claims taking into consideration the complaints. The defendant's complaints as articulated in its Rule 23(1) notice to cure and which forms the basis of its exception, are the following (in summary whilst using the same terminology the defendant used): regarding both claims 1 and 2 the plaintiff's claim does not comply with Rule 18(6) and is vague and embarrassing [this appears to be an introduction to the specific grounds relied upon regarding the two claims]; regarding claim 1 (i) the plaintiff has not indicated where the agreement relating to claim 1 which was reached on 1 October 2014 has been concluded as set out in paragraphs 4.1 to 4.3 of the particulars of claim ; (ii) the plaintiff has not indicated who represented the plaintiff in concluding the agreement with the defendant relating to claim 1 which was reached on 1 October 2014 as referred to in paragraphs 4.1 to 4.3 of the particulars of claim; and (iii) the plaintiff has not indicated on which date the amount of R1 433 310.27 relating to claim 1 should have been paid by the defendant; regarding claim 2 (i) the plaintiff has not indicated where the agreement relating to claim 2 which was reached on 1 October 2014 has been concluded as set out in paragraphs 14.1 to 14.3 of the particulars of claim ; (ii) the plaintiff has not indicated who represented the plaintiff in concluding the agreement with the defendant relating to claim 2 which was reached on 1 October 2014 as referred to in paragraphs 14.1 to 14.3 of the POC; and (iii) the plaintiff has not indicated on which date the amount of R23 891.73 relating to claim 2 should have been paid by the defendant. The defendant concludes that he is not able to plead

to the plaintiff's particulars of claim due to it being vague and embarrassing.

[10] I propose to deal first with the complaints levelled against the formulation of claim 1.

[11] Regarding the relevant parts of claim 1 the plaintiff alleges as follows: (i) it gave a pre-agreement statement and quotation for an overdraft facility in the amount of R1 800 000.00, dated 1 October 2014 and in writing (appended to the particulars of claim as annexure "B1"), to the defendant; (ii) the terms and conditions applicable to the overdraft facility appears from annexure "B2" which were also signed on 1 October 2014; (iii) the aforesaid quotation was accepted in writing by the defendant on 1 October 2014 as appears from annexure "B2"; (iv) pursuant to the acceptance of the quotation the plaintiff issued a bank facility letter on 3 October 2014 whereof a copy is appended to the particulars of claim as annexure "B3"; (v) the terms and conditions of the overdraft facility appears from the bank facility schedule attached to the particulars of claim as annexure "B4"; (vi) the defendant accepted the terms and conditions of the overdraft facility in writing and this acceptance lead to the conclusion of a written agreement between the plaintiff and defendant which was concluded at Heilbron whilst it was represented by A Snyman and the defendant acted in person. In terms of the agreement an overdraft facility by means of a cheque account was approved and allocated to the defendant with a specific account number; the facility in the amount of R1 800 000.00 had to be reduced to Rnil on 5 June 2015. As for the default the plaintiff

alleges in paragraph 12.1 that the defendant failed to reduce the overdraft by 5 June 2015 as agreed and that during the existence of the agreement between the parties the overdraft facility became overdrawn to the amount of R1 433 310.27.

[12] The plaintiff relies on the fact that the defendant failed to reduce the full amount as agreed as result whereof the plaintiff is entitled to claim payment.

[13] The plaintiff does not rely on separate agreements, but, as stated, only on the fact that with acceptance of the terms and conditions to the schedule, a written agreement was concluded. It has complied with the requirements of Rule 18(6) in relation to the agreement it relies upon. It also pleads when the amount had to be paid, namely 5 June 2015. From the allegations in the particulars of claim it is clear that the plaintiff's case is that the amount of R1.8 million as advanced would be payable in one instalment on 5 June 2015. It goes on to state that during the existence of the agreement the defendant only overdrew the account to R1 433 310.27.

[14] It is essential to understand the defendant's true complaint as it emerged during argument of the matter. What the defendant in fact complains of is this:

14.1 the acceptance by the defendant of the pre-agreement statement and quotation lead to the conclusion of an agreement between the parties. The plaintiff did not comply with the provisions of Rule 18(6) regarding this agreement (the allegations contained in paragraphs 4.1 to 4.3);

14.2 the agreement, annexure “B1”, fails to stipulate when payment was due and appears to provide for instalments;

14.3 the terms and conditions, annexure “B2”, contains provisions regarding the repayment which appears to be inconsistent with the contents of annexure “B1” and the allegations in the particulars of claim;

14.4 the terms of annexure “B1” and “B2” prevails if there are any inconsistency between them and annexures “B3” and “B4”.

14.5 annexures “B1” and “B2” also appears to have inconsistent terms regarding the repayment.

[15] It should be patently obvious that this is not at all what the Rule 23(1) notice complains of, save for the reference to the non-compliance with the provisions of Rule 18(6) regarding an agreement which the plaintiff does not plead as such.

[16] In my view there are apparent inconsistencies between the terms and conditions contained in the documents appended to the

particulars of claim and the plaintiff's allegations in the particulars of claim, but these were not brought to the plaintiff's attention and that is not what the exception, on the basis that the particulars of claim is vague and embarrassing, is based on.

[17] The agreement which the plaintiff relies on has been pleaded by the plaintiff. The plaintiff alleges when it was concluded and who represented the parties. The plaintiff specifically states, on its version, when the payment was due and why it claims the amount it seeks to recover from the defendant. Whether it will be able to prove its cause of action ultimately is irrelevant at this stage of the proceedings. The fact that the documents do not substantiate the terms pleaded or are inconsistent was not articulated in the Rule 23(1) notice.

[18] The defendant did not complain of the fact that the plaintiff's cause of action is invalid. The defendant did not rely on vagueness caused by inconsistency between the allegations in the particulars of claim and the annexures thereto. If anything, the Rule 23(1) notice failed to properly and adequately grasp with the true nature and grounds of the complaint if the arguments on behalf of the defendant are considered. In fact, the arguments seemed to be more likely a conclusion of the defendant's plea to the plaintiff's cause of action instead of an objection to the clarity and particularity of the cause of action as set out in the particulars of claim.

[19] In my view the defendant has failed to pass the threshold to satisfy the first requirement regarding claim 1, namely that the particulars of claim is vague and embarrassing on the grounds relied on. In any event and even if the particulars of claim was vague and embarrassing I am not persuaded that the grounds of exception were such that the defendant would be seriously prejudiced if the offending pleading were allowed to stand.

[20] The plaintiff claims to have entered into an agreement with the defendant. It pleaded the terms of the agreement and the manner in which it alleges that the agreement has been breached. Nothing prevents the excipient from pleading his version. He may deny that the parties had entered into the agreement as pleaded by the plaintiff or plead that the acceptance of the pre-agreement statement and quotation brought about a written agreement and the consequences thereof. He may plead the inconsistencies that were argued on his behalf during the exception and deny that the amount is due and payable or if he admits that agreements did come into existence with different terms, he is at liberty to plead his version of the terms. In conclusion the defendant is at liberty and fully able to plead to the allegations contained in the particulars of claim without any embarrassment or prejudice.

[21] I turn to consider the complaints regarding claim 2.

[22] Regarding the relevant parts of claim 2 the plaintiff alleges as follows: (i) it gave a pre-agreement statement and quotation for an

overdraft facility in the amount of R20 000.00, dated 1 October 2014 and in writing (appended to the particulars of claim as annexure "D1"), to the defendant; (ii) the terms and conditions applicable to the overdraft facility appears from annexure "D2"; (iii) the aforesaid quotation was accepted in writing by the defendant on 1 October 2014 as appears from annexure "D2"; (iv) pursuant to the acceptance of the quotation the plaintiff issued a bank facility letter on 3 October 2014 whereof a copy is appended to the particulars of claim as annexure "D3"; (v) the terms and conditions of the overdraft facility appears from the annexure to the bank facility schedule attached to the particulars of claim as annexure "D4"; (vi) the defendant accepted the terms and conditions of the overdraft facility in writing on 3 October 2014 and this acceptance lead to the conclusion of an agreement between the plaintiff and defendant at Heilbron whilst it was represented by A Snyman and the defendant acted in person. In terms of the agreement an overdraft facility by means of a cheque account was approved and allocated to the defendant with a specific account number; the facility would be a fixed term facility as appears from annexure "D3". As for the default the plaintiff alleges in paragraph 23.1 that the defendant failed to pay the amount due on demand. As to the amount owed the plaintiff alleges that during the existence of the agreement between the parties the overdraft facility became overdrawn to the amount of R23 891.73.

[23] Exactly the same considerations apply as did to the complaint to claim 1 above. The plaintiff does not rely on separate agreements but alleges that the agreement was only concluded when annexures

"D3" and "D4" were accepted by the defendant. The plaintiff alleges the payment was due on demand.

[24] The defendant during argument again relied on the content of the written agreements which are, on face value, inconsistent with the allegations in the particulars of claim. In particular it was argued that the written annexures did not provide for a specific payment date or payment upon demand. That is firstly not the complaint as articulated in the Rule 23(1) notice to cure and secondly a matter that can be pleaded and ventilated at trial.

[25] In my view, on the same considerations as applicable to the complaint to claim 1, the defendant has not satisfied the threshold requirement to establish that the particulars of claim is vague and embarrassing on the grounds relied upon by the defendant.

[26] There are apparent inconsistencies between the documents appended to the particulars of claim and the plaintiff's allegations in the particulars of claim, but that was not brought to the plaintiff's attention and that is not what the exception, on the basis that the particulars of claim is vague and embarrassing, is based on.

[27] The agreement which the plaintiff relies on has been pleaded. The plaintiff alleges when the agreement was concluded and who represented the parties. The plaintiff specifically states, on its version, that payment was due on demand and why it claims the

amount it seeks to recover from the defendant. The fact that the documents do not substantiate the terms pleaded or are inconsistent was not articulated in the Rule 23(1) notice.

[28] The defendant did not complain of the fact that the plaintiff's cause of action is invalid. The defendant did not rely on vagueness caused by inconsistency between the allegations in the particulars of claim and the annexures thereto. If anything, the Rule 23(1) notice failed to properly and adequately grasp with the true nature and grounds of the complaint if the arguments on behalf of the defendant are considered.

[29] The court will not go beyond the cause of complaint articulated in the notice to cure and exception as stated above. To do so would mean that the excipient is allowed to except on the basis that the pleading is vague and embarrassing without affording the other party proper notice to remove the cause of complaint.

[30] In any event and even if the defendant is correct with his complaint that the pleading is vague and embarrassing as alleged, I am not persuaded that the grounds of exception that the particulars of claim were vague and embarrassing were such that the defendant would be seriously prejudiced if the offending pleading were allowed to stand.

[31] The plaintiff also in claim 2 alleges to have entered into an agreement with the defendant. It pleaded the terms of the agreement and the manner in which it alleges that the agreement has been breached. Nothing prevents the excipient from pleading his version. As with the first claim the defendant is at liberty to deny that the parties had entered into the agreement as pleaded by the plaintiff or plead that the acceptance of the pre-agreement statement and quotation brought about a written agreement and the consequences thereof. He may plead the inconsistencies that were argued on his behalf during the exception regarding the terms of repayment and deny that the amount is due and payable or if he admits that agreements did come into existence with different terms, he is at liberty to plead his version of the terms. In conclusion the defendant is at liberty and fully able to plead to the allegations contained in the particulars of claim without any embarrassment or prejudice.

[32] I am compelled to remark on the manner in which the exception in this matter has been drawn. The plaintiff did not take issue and sought to have the merits ventilated. The plaintiff is clearly frustrated by the fact that the matter has been delayed. I touched on the requirements for an exception. In this matter the defendant refers to the Rule 23(1) notice to cure and then states that the defendant "hereby notes an exception to the plaintiff's particulars of claim as set out in such notice". This does not comply with the provisions of Rule 18(4). The grounds of the exception should, in addition to the allegation that the provisions of Rule 23(1) have been complied with and that the cause of complaint(s) was not expunged, be pleaded properly in

the exception. Obviously the defendant would not be allowed to supplement or change the grounds, but that does not mean that the defendant should not draw a proper exception. The notice is just that, a notice and not a pleading. In light of the fact that the parties argued the matter on the exception as filed and in absence of any prejudice I will leave the matter there subject to the court's censure of this manner of drawing exceptions.

[33] There are no reasons why the costs should not follow the result.

Accordingly, **IT IS ORDERED THAT**:

1. The exception is dismissed with costs.

N. SNELLENBURG, AJ

APPEARANCES:

On behalf of the excipient/defendant:	Adv E.G. Lubbe
On instructions of:	Mr A van Jaarsveld Gouws & Vertue Attorneys Bloemfontein

On behalf of the plaintiff:	Adv P.J. Heymans
On instructions of:	Mr J.P. Otto E G Cooper Majiedt Inc. Bloemfontein