



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

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

Case No.: 2310/2016

In the matter between:

ARNOLD PROPERTIES (PTY) LTD

Plaintiff

and

ZPC JOINERY (PTY) LTD

First Defendant

BAREND MATTHEUS PRETORIUS

Second Defendant

JOHAN LOUIS DU PLESSIS

Third Defendant

ALEN GUTLAR-BALKOVIC

Fourth Defendant

CORAM: HEFER, AJ

JUDGMENT: HEFER, AJ

HEARD ON: 1 SEPTEMBER 2017

DELIVERED ON: 14 SEPTEMBER 2017

- [1] The Plaintiff, duly represented and the First Defendant, duly represented, concluded a written agreement of lease in terms of which the First Defendant hired from the Plaintiff certain business premises situated in Durban, KwaZulu Natal. The period of lease was nine months commencing on 1 July 2015 and terminating on 31 March 2016.
- [2] In its particulars of claim the Plaintiff alleges that the First Defendant has breached its obligations in terms of the agreement by failing to pay the Plaintiff certain amounts for the period up to and including April 2016. Such arrears are then set out as follows:
- (i) For the lease period 1 July 2015 to 31 January 2016 at a basic monthly rental of R131 282.50; and
 - (ii) For the period of 1 February 2016 to 31 March 2016 at a basic monthly rental of R143 197.92.
- [3] The Defendants in their plea admit the conclusion of the lease agreement and the terms thereof of which a copy is attached to the particulars of claim.
- [4] In answer to Plaintiff's allegations to the effect that the Plaintiff has performed all its obligations in terms of the lease agreement, Defendants denied such allegation and in particular averred that the Plaintiff failed and/or neglected to give beneficial occupation of the leased premises to the First Defendant from or about 1 July

2015 in that the leased premises were not suitable to operate a carpentry or joinery workshop from as envisaged in the lease agreement due to *inter alia* insufficient or interrupted electricity supply to and/or inadequate electrical installation to the leased premises.

- [5] In answer to the Plaintiff's allegations pertaining to the arrear rentals as claimed, the Defendants further plead that the total rental payable for the lease for the period from 1 July 2015 to 31 January 2016 was the amount of R131 282.50 plus VAT whilst the total of rental payable by the First Defendant to the Plaintiff in respect of the lease for the periods from 1 February 2016 to 31 March 2016 was the sum of R143 097.92 plus VAT. Defendants in other words plead that the amounts which the Plaintiff claims as being monthly rentals were in fact the total amounts rental payable in terms of the lease for the periods as specified.
- [6] As far as it may be found that such rentals were not all inclusive rentals, the Defendants further plead that the Plaintiff's claim incorporates amounts for other charges and/or amounts, other than rental, for which the First Defendant has to date, not received any proof, summary and/or invoice in the absence of which, Plaintiff is barred from claiming such amounts from the First Defendant under and in respect of the lease.
- [7] The First Defendant then also filed a counterclaim in which First Defendant repeats the relevant portions of Defendants' plea referred to above, as well as certain allegations as contained in Plaintiff's amended particulars of claim. Plaintiff raised an

exception to both Defendants' plea as well as the counterclaim on the following grounds:

[7.1] FIRST EXCEPTION:

Insofar as the Defendants' allege that the Plaintiff failed to give beneficial occupation of the leased premises to the First Defendant in that the premises were not suitable for the purpose for which they were let due to insufficient or interrupted electricity supply and/or inadequate electrical installation, such allegation is inconsistent with the written terms of the lease which provides:

- (a) that the Plaintiff did not warrant that the premises were fit for the purpose for which it were let;
- (b) that the First Defendant would, at its own costs repair and maintain the electrical installations, power supply and electrical systems;
- (c) that the First Defendant would have no claim of whatever nature including any claim for remission of rent nor a right to withhold rent, by reason of interruption of the supply of electricity or by reason of any electrical fault, even if such was caused by an act or omission of the Plaintiff;

- (d) that in any event, the Plaintiff was not obliged to rectify any defect unless the First Defendant had notified it within fourteen days of the occupation date;
- (e) that the First Defendant would have no claim for reduction or abatement of rent not expressly contained in the written lease; and
- (f) that all warranties express or implied were included in the written lease.

[7.2] SECOND EXCEPTION:

In regards to Defendants' allegation that the rentals as claimed were indeed the total all- inclusive rent and not the monthly rentals as alleged by the Plaintiff, such allegations are inconsistent with the lease which provides:

- (a) that the total monthly rental would be payable monthly in advance on the first day of every month;
- (b) that the initial total monthly rental was R131 282.50 per month;
- (c) that the monthly rental would escalate as set out in the schedule to the lease; and
- (d) that according to the said schedule, the rent would escalate to R143 097.92 with effect from 1 February 2016.

[7.3] **THIRD EXCEPTION:**

Insofar as the Defendants allege that, to the extent that the amounts claimed by the Plaintiff for charges other than rent, would not be due until the First Defendant had received "*proof, summary and/or invoice in respect thereof*", in respect thereof, the Plaintiff refers:

- (a) to its particulars of claim in which the Plaintiff alleges that it claims the amounts calculated as set out in annexure "C" thereto from which it is apparent that amounts other than rent are for electricity, refuse and interests; and
- (b) the written agreement of lease which provides when these amounts fall due for payment and it does not provide that such amounts would only be due upon receipt by the First Defendant of proof, summary and/or invoice in respect thereof.

[8] In regards to all three grounds of exception, the Plaintiff contends that such allegations are inconsistent with the written lease agreement and are accordingly vague and embarrassing, alternatively, do not disclose a defence.

[9] In his very concise heads of argument, *Mr. Bingham* , on behalf of the Plaintiff, referred me to the matter of **Trope v South African**

Reserve Bank and Another 1992 (3) SA 208 (TPD) in regards to the element of “*vagueness and embarrassment*” and the matter of **Levitan v New Haven Holiday Enterprises CC** 1991 (2) SA 297 (CPD) in regards to the element of prejudice as requirements for an exception to be upheld.

- [10] According to Mr. *Bingham*, because the allegations in the plea and counterclaim are inconsistent with the written terms of the lease, the pleadings are accordingly contradictory and whereas they are not pleaded in the alternative they are therefore vague and embarrassing. In **Trope v South African Reserve Bank** *supra* it was confirmed that an exception to a pleading on the ground that it is vague and embarrassing involves a twofold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes an embarrassment of such a nature that the excipient is prejudiced. In **Levitan v New Haven Holiday Enterprises CC** *supra*, Conradie J said the following:

“Prejudice to a litigant faced with an embarrassing pleading must ultimately lie in an ability properly to prepare to meet his opponent's case.”

At p. 298 I – J.

- [11] Both the matters referred to by Mr. *Bingham* dealt with an exception on the basis of being vague and embarrassing and was this in fact the basis on which argument was advanced on behalf of the Plaintiff in regards to the present exception raised.

- [12] Of importance is that in the Trope- matter the Court was dealing with averments in the pleadings which were contradictory. McCreath J also referred to pleadings "...which leaves one guessing as to its actual meaning". The Plaintiff in the present matter, however, is not dealing with contradictory allegations but indeed with allegations which are, according to the Plaintiff, inconsistent with the contents of the written lease agreement. At this stage already I wish to indicate that we are not dealing with pleadings both in regards to the plea as well as the counterclaim by the Defendants which indeed leaves one guessing as to its actual meaning or which can be read in any one of a number of ways.
- [13] The two grounds on which an exception may be raised, is a pleading being vague and embarrassing, alternatively the pleading not disclosing a cause of action or defence. The terms "*vague and embarrassing*" should not be taken into isolation, but is indeed meant to be used and considered in conjunction with each other to see what the end result is. In plain words, with reference to the words used in the Trope- matter, a litigant who intends raising an exception to a pleading, should ask itself whether the allegations as contained in the particular pleading is of such a nature that the relevant litigant is so "*embarrassed*" that he/she is indeed confused in respect of what is actually meant in the pleading to which such a party intends raising an exception.
- [14] If one considers the plea and counterclaim in the present matter, it cannot be said that the allegations contained therein are of such a nature to leave one guessing as to its actual meaning. The

question then remains to be answered is whether the mere alleged inconsistency referred to by the Plaintiff renders the relevant pleadings excipiable.

[15] *Mr. Snyman* on behalf of the Defendants referred me to the principle that exceptions are generally not appropriate procedure to settle questions of interpretation. In **Picbel Groep Voorsorgfonds v Somerville** 2013 (2) ALL SA 692 (SCA) the Court confirmed that the proper approach is that an excipient bears the burden of persuading the Court that upon every interpretation which the particulars of claim and any agreement on which they rely can reasonably bear, no cause of action is disclosed. In the present matter therefore, if the relevant clauses of the lease agreement could reasonably bear any meaning that supported a defence or then also a cause of action in regards to the counterclaim as advanced by the Defendants, the exception should fail.

[16] In **Callender-Easby v Grahamstown Municipality** 1981 (2) SA 813 (ECD) Howie J (as he then was) said the following:

"What is clear is that the uncertainty attaching to the pleadings intention cannot avail the third party unless he shows that on either construction Defendant's claim is excipiable."

[17] Again, as far as the present pleadings are concerned and in particular the plea and counterclaim, there can be no uncertainty of what the intention of the Defendants were in pleading as they had done .

- [18] In Glaser v Heller 1940 (2) PH F 159, it was stated that the true object of an exception is either, if possible to settle the case in a cheap and easy fashion or to protect oneself against an embarrassment which is so serious as to deserve the costs, even of an exception.
- [19] In Barclays National Bank Ltd v Thompson 1989 (1) SA 547 AD Van Heerden JA confirmed that save for exceptional cases, such as those where a Defendant admits the Plaintiff's allegations but pleads that as a matter of law, the Plaintiff is not entitled to the relief claimed by him, an exception to a plea should consequently also not be allowed unless, if upheld it would obviate the leading of unnecessary evidence. Of further importance is that it was further stated that an exception may not be taken to part of the plea unless it is self-contained, amounts to a separate defence and can therefore be struck out without affecting the remainder of the plea.
- [20] In McKelvey v Chowan N.O. 1980 (4) SA 525 Z it was confirmed that the first principle in dealing with matters of exception is that, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. Furthermore, a pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.
- [21] In Sun Packaging (Pty) Ltd v Vreulink 1996 (4) SA 176 AD Nestadt JA stated the following at 184 E – F:

"The mere notion or possibility that evidence of surrounding circumstances may influence the interpretation of a contract does not necessarily operate to debar a Court from deciding the issue on exception."

- [22] In this regard reference was further made to the matter of **Davenport Corner Tea Room (Pty) Ltd v Joubert** 1962 (2) SA 5 where the following was stated at 716 B – E:

"There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts or there may be allegations from which it may be inferred that further facts affecting the interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper but the shield should not be allowed to protect the Respondent where it is composed entirely of a conjectural or speculative hypothesis, lacking any real foundation in the pleadings or in the obvious facts."

- [23] A further principle which should also be taken into account in regards to exception, is that the pleadings must be read as a whole and in deciding an exception *"a Court is not playing games, blindfolding itself"*. (As per Harms JA in **Telematrix (Pty) Ltd v Advertising Standards Authority SA** 2006(1) SA 461 (SCA)).

- [24] As already stated above, it cannot be said that the plea nor the counterclaim can be described as being vague and embarrassing. However, although *Mr. Bingham* did not base his argument thereupon, it should be investigated whether the particular portions

of the plea and counterclaim respectively, do contain allegations which disclose a defence in regards to the plea and a cause of action in regards to the counterclaim. In this regard the two exceptions in regards to the two different pleadings will be dealt with separately.

AD PLEA:

FIRST EXCEPTION:

[25] In response to the Plaintiff's allegation to the effect that the Plaintiff fulfilled its obligations in terms of the lease agreement, the Defendants pleaded that the Plaintiff failed to give beneficial occupation of the lease premises to the First Defendant from or about 1 July 2015, being the date of occupation, in that the leased premises were not suitable to operate a carpentry or joinery workshop from as envisaged in the lease due to, *inter alia*, insufficient or interrupted electricity supply to and/or inadequate electrical installation to the lease premises.

[26] It is not quite clear from the contents of the plea as a whole whether the Defendants plead that because of the fact that the Plaintiff did not fulfil its obligations in terms of the agreement, as alleged, the Defendants, and in particular the First Defendant, is not liable towards the Plaintiff for the amount as claimed. It would rather appear that the Defendants rely on the other two parts of the Defendants' defence as contained in the two further grounds of exception to deny liability for the amount as claimed. As already stated, the pleadings need to be considered as a whole. This part of the Defendants' plea appears not to go to the root of the

Defendants' defence in regards to the denial of liability. With reference to the allegations pertaining to liability, the Defendants do not refer to the non-fulfilment of the obligation pertaining to the "*beneficial occupation*" as part of denying liability towards the Plaintiff. The exception in this regard can therefore not succeed.

SECOND EXCEPTION:

[27] The Defendants further pleads that the total all-inclusive rental payable in terms of the lease for the period from 1 July 2015 to 31 January 2016 was the amount of R131 282,50 plus VAT whilst the total all-inclusive rental payable by the First Defendant to the Plaintiff in respect of the lease for the period from 1 February 2016 to 31 March 2016 was the sum of R143 097,92 plus VAT.

[28] In this regard *Mr. Bingham* referred me to the contents of annexure "A", being the schedule to the lease agreement upon which the Plaintiff relies. In this schedule included in the heading on "*lease periods*", the following appears:

*"From: 01/07/2015 to 31/01/2016 – R131 282,50;
01/02/2016 – 31/03/2016 – R143 097.92".*

[29] This part of the documentation may have assisted the Defendants for the said allegations contained in their plea (and in fact may have prompted the Defendants to raise the defence they have in this regard), had it not been for a further part of the said schedule, being annexure "A" to the particulars of claim, which reads as follows:

"Initial total monthly rental (excluding VAT) : R131 292.50."

[30] From these latter words it is obvious that the amounts referred to in the section named as "*Lease Periods*" could only have been in regards to the monthly rental payable by the First Defendant and not the total amount of rental payable as contended by the Defendants.

[31] In the absence of any allegations in the Plea showing the relevance of extraneous facts affecting any other interpretation for the contention as advanced by the Defendants in this regard, Defendants' Plea does not disclose a Defence on this basis

THIRD EXCEPTION:

[32] In denying liability towards the Plaintiff, the Defendants further plead that apart, from the amounts referred to being all inclusive rentals, that the amount claimed by the Plaintiff incorporates amounts for other charges and/or amounts other than rental, for which the First Defendant has to date, not received any proof, summary or invoice, in the absence of which the Plaintiff is barred from claiming such amounts from the First Defendant and in respect of the lease. From annexure "C" to the Plaintiff's particulars of claim, which is the document setting out the calculation of the amount as claimed by the Plaintiff, it indeed appears that the only charges in addition to the rental payable by the First Defendant to the Plaintiff, are charges pertaining to refuse removal as well as electricity supply.

[33] In this regard *Mr. Snyman* referred me to clause 44 of the lease agreement. This clause deals with the delivery of statements. In particular *Mr. Snyman* referred me to clause 44.3 which reads as follows:

"All and any utilities, including but not limited to, rates and taxes, water, electricity, sewerage, refuse and levies charged to the tenant by the landlord and which charges appear on the tenant's monthly invoice will be accepted by the tenant to be both true and correct and will constitute prima facie evidence in any litigation between the parties, provided that the tenant does not raise any query in regards thereto within fourteen (14) days from date of invoice."

[34] This is the clause which *Mr. Snyman* relies upon in support of the contention that the Plaintiff was obliged to supply the First Defendant with "*proof, summary and/or invoice*" in respect of refuse removal and electricity in the absence of which the Plaintiff is barred from claiming such amounts from the First Defendant.

[35] However, clause 44.1 of the lease agreement reads as follows:

"Any failure by the landlord to render any statement or the late receipt or non-receipt thereof by the tenant should not in any way detract from the tenant's obligations to effect payment of all amounts as set out in terms of this lease on the due date for payment thereof."

[36] *Mr. Bingham* further referred me to the contents of clause 24 of the agreement where amongst others in clause 24.8.1, the following appears:

"Notwithstanding any provisions to the contrary, should –

24.8.1.1 the landlord not have received any accounts from any local authority; or

24.8.1.2 at any time, any of the meters, sub-meters, or common sub-meters referred to in this clause 24 fail, then the tenant shall be liable for and shall pay an amount equal to the average meter charge per month for the lease premises calculates over the proceeding 9 (six) months and apply for the period under consideration. The parties shall respectively notify each other in writing upon any one of them discovering such a metering defect."

[37] Nowhere in the entire agreement is there any indication to the effect that any charges other than rent, is only due until the First Defendant had received the "*proof, summary and/or invoice*" in respect thereof. In addition there is no basis to find otherwise than that the contention as advanced by the Defendants in this regard compose entirely on conjecturable and speculative hypothesis lacking any real foundation in the pleadings or in the obvious facts.

AD COUNTERCLAIM:

FIRST AND SECOND EXCEPTION:

[38] The Defendants' counterclaim against the Plaintiff appears to be founded on the *condictio indebiti* in that the First Defendant made certain payments to the Plaintiff in the *bona fide* belief that certain amounts were payable by the First Defendant to the Plaintiff whilst such belief was incorrect. From the counterclaim it cannot be ascertained how the amount of R1 010 062.02 which was allegedly

paid in error is calculated. It does, however appear that the basis for such a counterclaim might be founded on, amongst others the allegations as contained in paragraph 13 of the Defendants' plea. Paragraph 13 of the Defendants' plea contains the allegations pertaining to the second and third exceptions dealt with above and should the exceptions in regards to these allegations applicable to the counterclaim also be upheld.

[39] As is practice, the Defendants should be granted the opportunity to file amended pleadings if so advised. Therefore the following order is made:

ORDER:

1. The exception in regards to the plea, based on the second and third ground is upheld.
2. The exception in regards to the counterclaim in regards to both grounds is upheld.
3. Defendants' plea as well as counterclaim are set aside.
4. Defendants are granted leave to amend their plea and counterclaim within twenty one (21)days after this order.
5. Defendants are ordered to pay the costs of the exception in regards to both the plea as well as the counterclaim.



J.J.F. HEFER, AJ

On behalf of the Plaintiff/Excipient : Adv. M. Bingham
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