



**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 : 5158/2013

In the matter between :

**THE MEMBER OF THE EXECUTIVE COUNCIL
OF THE DEPARTMENT OF CO-OPERATIVE
GOVERNANCE, HUMAN SETTLEMENTS AND
TRADITIONAL AFFAIRS, FREE STATE
PROVINCE**

PLAINTIFF

V

**SCENIC ROUTE TRADING 802 CC
JORE CONSTRUCTION CC**

1ST DEFENDANT

2ND DEFENDANT

CORAM :

MURRAY, AJ

HEARD ON :

2 SEPTEMBER 2016

JUDGMENT BY : MURRAY, AJ

DELIVERED ON : 22 DECEMBER 2016

- [1] The First Defendant has excepted against the Particulars of Claim of the Plaintiff who sued two Defendants in the same action, but on two different causes of action: unjust enrichment and breach of contract. The First Defendant avers that the summons is therefore vague and embarrassing.
- [2] The Plaintiff is the Member of the Executive Council of the Department of Co-operative Governance, Human Settlements and Traditional Affairs of the Free State Province. The First Defendant is Scenic Route Trading 802 CC whom the Plaintiff had commissioned to supply building materials for low-cost housing to be built by the Second Defendant, Jore Construction CC.
- [3] The Plaintiff pre-paid the First Defendant a total amount of R3,931,632.00 under the erroneous assumptions that the First Defendant would supply building materials on behalf of the Plaintiff

to the Second Defendant for the construction of the said housing, and that, accordingly, the debt will become due to the First Defendant, or that such building material will be legally payable to the First Defendant by the Plaintiff. The Plaintiff now reclaims the money from First Defendant on the basis of unjust enrichment. The Plaintiff alleges that the monies were paid over *sine causa* and comprise State funds whose payment to the First Defendant constituted “irregular, unauthorised, fruitless and wasteful expenditure” as contemplated in Section 1 of the Public Finance Management Act, 1 of 1999. The Plaintiff alleges that on that basis it is entitled to recover such unauthorised and irregular payments from the First Defendant for unjustified enrichment.

- [4] The Plaintiff contracted the Second Defendant to build 400 houses in Thaba Nchu (“**the housing project**”). The contract had to be extended on four different occasions because of problems which the Second Defendant encountered, allegedly because of, *inter alia*, the non-delivery of building materials. The Plaintiff alleges that the Second Defendant was contractually and legally bound to render a true, proper and full statement of account to the Plaintiff in respect of the housing project; and to consent to and participate in debatement of such accounts with the Plaintiff. The Plaintiff then

sued the Second Defendant for breach of contract in that it failed or neglected or refused to render to Plaintiff such statement of account, which included, *inter alia* proper records of all building materials supplied to it, if any, by the First Defendant for the housing project; and/or all orders for building materials placed by it to the First Defendant; and/or all invoices issued by the First Defendant regarding building materials supplied to the Second Defendant and their prices; and/or all certified invoices which prove receipt of the said building material.

[5] The First Defendant objected to the Plaintiff's Particulars of Claim on several grounds, namely :

5.1 That the Plaintiff sues First and Second Defendant in the same action but on two different legal grounds, namely enrichment and breach of contract;

5.2 That the claim against Second Defendant is based on a contract for housing units or a housing project without specifying that it concerns "low-cost housing";

- 5.3 That paragraph 14 of the Particulars of Claim claims that the Plaintiff is entitled in terms of Uniform Rule 10(3) to sue both Defendants in the same action, but does not specify “*the same questions of law and/or facts*” pertaining to the two Defendants in terms of which it is entitled to do so. It was submitted, furthermore, that paragraph 14 is merely a conclusion without any supporting *facta probanda* and therefore does not comply with Rule 18(4);
- 5.4 That no connection is drawn between the “building materials” with reference to the First Defendant and the “housing project” with reference to the Second Defendant and that, moreover, it specifies that the “building material” is intended for “low-cost housing” whereas there is no reference to “low-cost housing” pertaining to the Second Defendant;
- 5.5 The First Defendant therefore avers that paragraph 14 does not establish any clear connection between the First and Second Defendants and does not specify or make it clear why both may be sued in the same action in terms of Uniform Rule 10(3).

- [6] Adv C Ploos van Amstel SC, and with him Adv C Snyman, appeared on behalf of the Plaintiff. Adv S Reinders appeared for the First Defendant (“**the Excipient**”).
- [7] Mr Reinders submitted that the Plaintiff is obliged to make out a proper case with good reasons for its alleged entitlement to rely on Rule 10(3), failing which either of the Defendants would be entitled to raise a special plea of misjoinder. According to him, the Plaintiff, instead of setting out the material facts on which it relies for its claims, in paragraph 14 merely pleaded a conclusion with no *facta probanda*, and no indication of the questions of law or questions of fact it relies on.
- [8] Mr Reinders, with reference to **Imprefed (Pty) Ltd v National Transport Commission**¹, described the object of pleading as to define the issues with sufficient particularity to enable the other party to know what case it has to meet and to enable it to reply thereto. With reference to **Buchner v Johannesburg Consolidated Investments Co Ltd**² he pointed out that a summons which is merely based on conclusions and opinions instead of pleading the material facts upon which a plaintiff relies,

¹ 1993 (3) SA 94 (A) at 107 C - E

² 1995 (1) SA 215 (T) at 216 I

is defective. He submitted that it is neither apparent nor clear from the Plaintiff's Amended Particulars of Claim why or on what basis it is entitled to sue the Defendants in one action. He accordingly asked the Court to set aside the Plaintiff's Particulars of Claim and to grant the Plaintiff leave to amend its Particulars, failing which that leave be granted for the First Defendant to approach the Court to have the Plaintiff's claim dismissed.

- [9] Mr Ploos van Amstel SC, on the other hand, asked for the exception to be dismissed with costs, on various grounds. He stated, first of all, that the exception does not strike at the formulation of the root of the cause of action while the relevant law makes it clear that exceptions that the pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the matter. See, for instance, **Jowell v Bramwell-Jones and Others**³ and **Nel and Others NNO v McArthur and Others**⁴. Such an exception, furthermore, may not refer to only certain parts of the Particulars of Claim, as the present exception does by focusing mainly on paragraph 14 of the

³ 1998 (1) SA 836 (W) at 899

⁴ 2003 (4) SA 142 (T)

Particulars of Claim. It is the whole cause of action which must be demonstrated to be vague and embarrassing⁵.

- [10] In **Lockhat and Others v The Minister of the Interior**⁶ the Court held that a statement is “vague” when it is either meaningless or capable of more than one meaning. It determined that a reader must be able to extract from the statement a clear single meaning. It is “embarrassing” if it cannot be gathered from the statement what ground the pleader relies on. As Davis AJA in **General Commercial and Industrial Finance Corporation Ltd v Pretorius Portland Cement Co Ltd**⁷ stated:

“After all, we have to look at the matter from the point of view of the party who is faced with a pleading of this nature. How is he to know what case he is called upon to meet?”

- [11] In *Nel and Others NNO v McArthur*⁸ the Court cautioned, furthermore, that a pleading must be excipiable on every interpretation reasonably attachable to it. If a Defendant is fairly able to plead to a Particulars of Claim, such pleading can hardly be called vague and embarrassing. In **South African National Parks**

⁵ Jowell, *supra*, at 899 G

⁶ 1960 (3) SA 765

⁷ 1944 AD 444 at 454

⁸ 2003 (4) SA 142 (T)

v Ras⁹ the Court made it clear that one is not to look too critically at a pleading. Henochsberg J confirmed this in the *Lockhat* case¹⁰:

“As long as a declaration reasonably states the nature, extent and grounds of the cause of action the Court will not as a rule strike out paragraphs as vague and embarrassing provided the information given is reasonably sufficient and provided it does not appear to the Court that the particulars cannot be pleaded to by the defendant.”

[12] The Court emphasised, furthermore, in **Venter and Others NNO v Barrit Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd**¹¹ that the information in the Particulars of Claim generally need only be sufficient for the Defendant to plead thereto. In *South African National Parks v Ras*¹² the Court went so far as to hold that unless the excipient can satisfy the Court that there is a real point of law or a real embarrassment, an exception alleging that a pleading is vague and embarrassing should not be allowed.

[13] The excipient in the present case did not allege any prejudice. The only complaint was against the apparent lack of a connection between the cases of the two Defendants and the reference to

⁹ [2001] 4 ALL SA 380 (C)

¹⁰ 1960 (3) SA 765 at 777 E

¹¹ 2008 (4) SA 639 (C)

¹² 2002 (2) SA 537 (C) at 541

low-cost housing regarding the payments to the First Defendant which, it was argued, would lead to speculation about whether the housing project and the low-cost housing mentioned in the respective claims refer to the same project. The purpose of the exception, it was submitted, was to save the First Defendant from having to speculate about this if the matter proceeds. And to save it from speculation about the “same questions of fact and law” on which the joinder is based.

[14] Mr Ploos van Amstel SC, correctly so in my view, argued that the Court needed to follow a pragmatic approach by looking at the pleadings and the Particulars of Claim as a whole rather than at one or two paragraphs on their own as the First Defendant has done. This approach is in accordance with the approach to exceptions which aver that a pleading is vague and embarrassing, namely that the excipient needs to demonstrate that the entire cause of action is vague and embarrassing, not just one or two individual paragraphs.

[15] The onus is on an excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. (See

Nel and Others NNO v McArthur and Others.¹³) The Court must decide on the particular facts of each case whether an excipient will be prejudiced if he is compelled to plead to the Particulars of Claim in the form to which he objects.¹⁴

[16] In *Nel and Others NNO v McArthur and Others*¹⁵ the Court explained that an exception alleging vagueness and embarrassment involves a twofold consideration:

16.1 Whether the pleading lacked particularity to the extent that it is vague (in the sense of rendering it meaningless or capable of more than one meaning), and

16.2 Whether the vagueness caused embarrassment of such a nature that the excipient is prejudiced.

[17] The Court stated, furthermore, that the excipient's ability to produce an exception-proof plea is neither the only, nor the most important test. The Court therefore needs to consider, first of all, whether the pleading lacks particularity to the extent amounting to

¹³ 2003 (4) SA 142 (T)

¹⁴ *Venter v Baritt Venter v Wolfsberg Arch Investments*, *supra* at [17] at 645

¹⁵ *supra*, at 147 A /B – B, E/F – F/G and H/I

vagueness amounting to embarrassment, and secondly to do a qualitative analysis of such embarrassment. It then needs to keep in mind that it is only where embarrassment is so serious as to cause prejudice to the excipient that the exception would be allowed. In doing such evaluation a charitable test was to be used in deciding whether a cause of action had been established since a pleader is entitled to a benevolent interpretation.

[18] Mr Ploos van Amstel SC pointed out the relevant facts alleged in the Particulars of Claim, namely:

18.1 That the Plaintiff gave the first Defendant almost R4 million in advance with instructions to supply building material to the Second Defendant. The Plaintiff does not know what happened to the money. It therefore alleges that it was paid *sine causa* and demands that the First Defendant accounts for the money. It alleges that the First Defendant was unjustly enriched because Plaintiff gave it the money on the erroneous assumption that it would use the money to supply building materials to the Second Defendant.

18.2 The Plaintiff awarded the Second Defendant a contract to build the housing project and assured it that First Defendant would supply it with the necessary building material. Second Defendant was to build 400 houses and to report fully to the Plaintiff during the construction process, including about whatever happened between First and Second Defendants regarding the building materials. Neither of the two Defendants had been willing to report to the Plaintiff, either about the building material or about the housing project. Second Defendant is therefore sued to produce statements of account and to participate in the debatement thereof.

[19] I agree with Mr Ploos van Amstel SC that the Particulars of Claim are not so wanting in clarity that the First Defendant should have difficulty in pleading thereto.

19.1 Regarding the First Defendant the Amended Particulars of Claim sets out the following :

“That a total amount of R3,931,632.00 was paid by the Plaintiff to ‘... the First Defendant on the assumptions by the DHS that

13.1 the payments are made in advance in that a debt will become due to the First Defendant in that building material to the value of R3,931,632.00 will be supplied by the First Defendant on behalf of the DHS to the Second Defendant for the construction of low-cost housing; and/or

13.2 such building material will be legally payable by the DHS to the First Defendant;

both assumptions which thereafter, proved to have been incorrect and false'."

19.2 Regarding the Second Defendant the Plaintiff alleges in its Amended Particulars of Claim that :

(a) "It concluded a written building contract for the construction by Second Defendant for and on behalf of the Plaintiff, of a number of houses;

(b) Which agreement the Second Defendant breached by, *inter alia*, "... failing or neglecting or refusing to render the Plaintiff a full, proper, complete and adequate statement of account in respect of the housing project, comprising of the following documents and/or information, including but not limited to :

7.1

7.2

7.3

7.4

7.5 proper records of all building materials supplied to it, if any, by First Defendant for the housing project; and/or

7.6 all orders for building materials placed by it from the supplier (the First Defendant); and/or

- 7.7 all invoices issued by the building material supplier (the First Defendant) regarding building materials supplied to it and the prices therefore; and/or
- 7.8
- 7.9 price lists for building material agreed upon by it and the building material supplier (the First Defendant); and/or
- 7.10
- 7.11
- 7.12
- 7.13 lists of expenditure on the housing project.”

[20] I agree that taken with the other express averments appearing in the Plaintiff’s Amended Particulars of Claim, the First Defendant could be left in little doubt as to why the action had been brought against it in the same papers as the action against the Second Defendant, and as to why, “... *on face value* ...” and contrary to what has been suggested for and on behalf of the First Defendant regarding the Plaintiff’s causes of action, such causes of action have everything to do with each other.

[21] In my view the connection between the First and Second Defendants is clear from the passages of the Plaintiff’s Amended Particulars of Claim quoted and referred to above. I have to agree that there can be no doubt, contrary to what has been submitted on behalf of the First Defendant and on any interpretation of the Amended Particulars of Claim, that the dispute arising between the

two parties depends on the determination of substantially the same question of law and/or fact. It is clear from the passages quoted above that the supply of or failure to supply building material by the First Defendant to the Second Defendant is paramount in the Plaintiff's causes of action against both First and Second Defendants.

[22] In **Jowell v Bramwell Jones**¹⁶ it was stated that what the Plaintiff is required to furnish, is not a completed puzzle, but merely an outline of the case.

“The outline may be asymmetrical and possess rough edges which are 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”.

[23] The *basic* requirement is that the Defendant must be given a clear enough exposition of the Plaintiff's case that it is able to take instructions from the client and file an adequate response to the claim in the form of a plea, and as explained in **Absa Bank Ltd v Boksburg Transitional Local Council**¹⁷ such plea may even

¹⁶ 1998 (1) SA 836 (W) at 913 F-G

¹⁷ 1997 (2) SA 415 (W) at 422 C-D. See also Lockhat, *supra*, at 777 E

consist of a bare denial of all the averments in the Particulars of Claim, just as long as there is no ambiguity in such denial.¹⁸

[24] The First Defendant averred that the Particulars of Claim did not comply with Uniform Rule 18(4) which requires that every pleading sets out the material facts on which the pleader relied for his claim with sufficient particularity to enable the opposite party to reply thereto. But, as in the present case, Particulars of Claim may fail to comply with Rule 18 without being vague and embarrassing, as held in **Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd v Marthinussen**¹⁹.

[25] In accordance with what the Court pointed out in **McKelvey v Cowan NO**²⁰, namely that:

“if evidence can be lead which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence lead on the pleading can disclose a cause of action”

I am of the view that in the present case, the pleading is not excipiable since evidence can be lead to fill in the ‘missing pieces’

¹⁸ Lockhat, *supra*, at 778 A

¹⁹ 1992 (4) SA 466 (W) at 470 A

²⁰ 1980 (4) SA 525 (Z) at 426 D-E

in the “puzzle” to further prove the connection between the two Defendants.

[26] Another reason why the exception in my view cannot succeed is that the First Defendant has not met the requirement that

“save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed”.

(See **Colonial Industries Ltd v Provincial Insurance Co Ltd**²¹.)

[27] That approach has been consistently followed by the Courts. It is summarised as follows :

“The Court should not look at the pleading with a magnifying glass of too high power. It is the duty of the Court when an exception is taken to a pleading first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not then it must see if there is an embarrassment which is real as a result of the faults in the pleading to which exception is taken. Unless the excipient can satisfy the Court that there is such a point of law or such real embarrassment the exception should be dismissed.”²²

²¹ 1920 CPD 627 at 630

²² See : Joubert (Editor) Law of South Africa, Vol 3, Part 1 (1st Re-issue by Harms & Van der Walt, 1997) at para 186. See also : South African National Parks v Ras, *supra*, at 541

[28] The onus is on the First Defendant, therefore, to show embarrassment to the extent that it cannot plead to the Particulars of Claim or know what the case against it is. (See *Nel and Others NNO v McArthur and Others*²³.) In my view it has not done so and has not shown the serious prejudice required for such an exception to be allowed if one indeed looks at the Particulars of Claim as a whole and not just at paragraphs 13 and 14 thereof.

[29] It is clear from the Particulars of Claim, paragraphs 1(a) and (b), that the Plaintiff is the Government Department, previously known as the Department of Housing, whose task it is to provide homes for poor and homeless people in great numbers. As Mr Ploos van Amstel SC submitted, it is indeed common knowledge that the Plaintiff has built hundreds of low-cost houses in accordance with S 26(1) and (2) of the Constitution. The Department's task is to provide housing and to provide the resources for the building of the low-cost houses in the housing projects. Anyone contracting or working with the Department would know that. In paragraph 18, with reference to the First Defendant, the Plaintiff states that the money paid over to it, was State funds provided by the National

²³ *supra*, at 148

Treasury for the provision of low-cost housing. Again, anyone dealing with the Plaintiff would know that.

[30] First Defendant complained about the various references to the housing project as “houses”, “housing projects” and “low-cost houses” being confusing, but I agree with Mr Ploos van Amstel SC that if one reads the particulars as a whole, instead of concentrating on one or two single paragraphs, common sense dictates that all of the references are to low-cost housing.

[31] Paragraph 1 of the claim against the Second Defendant clearly states that the statement of account which it is requested to deliver is in respect of the housing project number F10080012 for the erection of 400 low-cost houses in Thaba Nchu. Similarly paragraph 13.1 of the monetary claim against the First Defendant specifies that the payments of R3,931,632.00 were for building material to be supplied by the First Defendant on behalf of the Plaintiff *to the Second Defendant for the construction of low-cost housing*.

[32] There can therefore in my view be no doubt that it is clear *ex facie* the Particulars of Claim that the two claims against the two

Defendants are closely inter-connected and that the “housing project” and “low-cost housing” refer to the same project. Clearly the subject matter of both claims is the building material to be provided to the Second Defendant. In my view there can therefore be no confusion to such an extent that the First Defendant is unable to plead to the claim against it. After all, it dealt with the Department, it knows what the money was received for, and it knows what it delivered or did not deliver. There is no reason, therefore, for it not to be able to plead to the Particulars of Claim as they stand.

[33] The allegation that the Particulars of Claim lack the material averments to sustain the conclusion that the two Defendants may be sued in one action in my view has no merit either. It was alleged that the necessary *facta probanda* are absent. But I agree with Mr Ploos van Amstel that that is not true: they are there and they are unambiguous.

[34] Clearly the emphasis should not be on the housing and whether it is low-cost or not, but on the building material which had to be supplied and utilised and accounted for. That is why the Second Defendant was asked to give full particulars regarding its deals

with reference to the building material. In the exposition of the Second Defendant's alleged breach of the building contract, reliance is placed on the building materials specifically in subparagraphs 7.5 to 7.12 to be read with Annexures "POC1" B and C. Items 5 to 12 of the Schedule is a statement of account regarding building materials. Page 28b lists documents regarding building materials, with specific reference to the housing project in Items 5 and 13.

[35] It is apparent from the Particulars of Claim that building material is the source of the claims against both the Second and the First Defendants. It is safe to infer that the payment was made for First Defendant to supply building material to Second Defendant for the housing project. Plaintiff requires the First Defendant to pay back that pre-paid State money which has remained unaccounted for and requires the Second Defendant to report what happened to the building materials that the Plaintiff has paid for.

[36] Since it is State funds supplied by National Treasury, the Plaintiff is not only entitled but also obliged to determine what happened to it, which entitles it to ask for the records from the Second Defendant

in accordance with the relevant provision in the latter's Construction Contract.

[37] The First Defendant's complaint that the Particulars of Claim lacked *facta probanda* to support the conclusion that the two Defendants may be sued in the same summons therefore has no merit. If the two Defendants had not been sued in the same action, the practical consequences could have been divergent judgments regarding the same issue. Two different courts hearing the separate trials might have come to two different conclusions as to whether the building materials had indeed been supplied since either Defendant would be uncooperative as a witness in the other's trial. For that very reason Rule 10(2) and 10(3) make specific provision for joinder as long as there is a real possibility that the same facts are material in both instances. Obviously if the matter is then heard as one action, it is easier for the Court to determine.

[38] In the present case substantially the same questions must be answered by both Defendants. First Defendant has to account for the money and Second Defendant for the building materials. All the facts will then be before the same Judge who would judge both

issues. “Joinder” occurs when more than one party or more than one cause is combined in a single action. The reason is usually convenience to save time and money.²⁴ It is a matter of convenience to have all the parties before Court.

[39] The First Defendant knows very well that the issue before the Court is the question regarding what happened to the building materials. He, as supplier with no written procurement contract, has the onus to explain what happened to the money and the supplies. He was paid in advance, allegedly *sine causa*, wherefore this action for enrichment against him.

[40] The Court could also *mero motu* raise the question of non-joinder. Mr Ploos van Amstel SC submitted that the Court would have done so if they had not been sued in one action. If the First Defendant is not before Court and the Court were to find against him, the matter against him would be *res judicata*. If the First Defendant were to say that he gave the supplies to the Second Defendant and that the Court is to find that it had been misappropriated by the Second Defendant, the Court would be unable to make such a finding

²⁴ Herbstein & Van Winsen, Vol 1, p. 208

against him if he is not before Court. Obviously the Court would therefore *mero motu* have raised non-joinder.

[41] The supplier (First Defendant) has a real direct *bona fide* interest in the contractor's case and *vice versa*. Accordingly they need to be joined of necessity.²⁵ For joinder by necessity the test will be satisfied if there is a possibility of a real and substantial interest. The Court will then not entertain the matter unless both parties are before Court. Neither will it order a separation of trials as suggested by the First Defendant.

[42] Even if the exception is dismissed, the First Defendant will still be able to raise misjoinder in a special plea at the trial. It is not suffering any embarrassment or inability to plead. Even though both parties have a real and substantial interest in each other's cases, only the First Defendant is sued for almost R4 million. As stated in *Herbstein & Van Winsen*²⁶ a person has the right to insist on being joined. Similarly the Court has a discretion to say that it wants both parties before it, even in the absence of a direct and substantial interest.

²⁵ *Herbstein & Van Winsen*, at 215 - 219

²⁶ *supra*, at 215

[43] In *Herbstein & Van Winsen*²⁷ the authors stated that the Rules of Court are not intended to be exhaustive regarding joinder. The Court still has a discretion to order joinder for the sake of convenience in terms of the common law²⁸. In ***Dendy v University of the Witwatersrand***²⁹ the Court held that although the questions of law and fact must essentially be the same, that is not an absolute requirement. A number of Defendants may be joined if convenience so requires. The Courts are clear that where there is a multiplicity of cases, there is the concomitant danger of different judgments by different Courts. From a policy point of view that cannot be risked. Wherefore, if there is a reasonable prospect of overlap, convenience dictates joinder to prevent conflicting judgments.³⁰

[44] Rule 10(2) and ***Dendy v University of Witwatersrand***³¹ specifically provide for the prevention of a multiplicity of judgments regarding the same subject matter. The Supreme Court of Appeal in ***Trustbank v Western Credit Ltd***³² stated that the test was that even where claims regarding different Defendants may be mutually

²⁷ p. 219, footnotes 85 and 86

²⁸ Rabinowitz, 1983 SA 415. See also : p. 210, footnote 24 with reference to Rabinowitz, par 419 E

²⁹ 2005 (5) SA 357 (W) at para. 71 to 75

³⁰ *Dendy v Wits*, *supra*, at para. 73. See also : *University of Stellenbosch v JA Louw* 1983 (4) SA 321 (A)

³¹ *supra* at para. 69 - 74

³² 1966 (2) SA 577 (AD)

exclusive, the Defendants may still be sued in one action if it is convenient. In the present matter the two causes of action are unjust enrichment and breach of contract which are inconsistent, but in **Van der Lith v Alberts**³³ a Full Bench held that inconsistent grounds of action may still be joined in the same action on grounds of convenience.

[45] Mr Ploos van Amstel pointed out, furthermore, that if the two Defendants had not been joined and the actions against both Defendants proceeded to *litis contestatio*, the Plaintiff would have been entitled to apply for consolidation of actions in terms of Rule 11³⁴ in any case.

[46] I therefore agree with him that the submission that no factual basis for the conclusion in paragraph 14 that the Plaintiff is entitled to join both Defendants in one action was provided, has no substance if one has regard to the papers as a whole and to the cross-references between the two claims against the two Defendants relating to the building material. It is clear that the two Defendants have concomitant and reciprocal obligations and that

³³ 1944 (TPD) 17

³⁴ Van der Lith, *supra*, and Herbstein & Van Winsen, *supra*, at 243 - 245

the two actions are interwoven and intertwined to the point that they must be joined.

[47] Regarding the complaint about the different references to houses, housing projects, low-cost housing, being confusing, I am satisfied that if paragraph 13 of the Particulars of Claim with reference to paragraph 5.1 is read with prayer B1 in which it is specifically stated that the requested statement of account pertains to 400 low-cost houses built in Thaba Nchu, and if one takes cognisance of the fact that the Plaintiff is the Housing Department of the Government that deals specifically with low-cost housing, the variable terminology cannot cause the Defendants any serious prejudice. Both Defendants know with whom they dealt, what they were required to do and what they did indeed do or not do. First Defendant should therefore have no problem with pleading to the Particulars as they stand. In view of the general principles of pleading endorsed by Courts, namely to move away from formality towards simplicity, and if it is reasonably clear what the Defendant is being sued for, then in the absence of prejudice technical objections would not be upheld.³⁵

³⁵ Joubert v Impala Platinum 1998 (1) SA 363 (BH) at 471 I

[48] I am therefore persuaded by Mr Ploos van Amstel SC's argument that the exception does not go to the root of the cause of action, and that it is not vague and embarrassing to the point that it causes the First Defendant serious prejudice. It does not prevent the First Defendant from replying and does not prevent it from knowing what case it has to meet.³⁶

[49] In coming to the conclusion that this exception cannot succeed, I rely on the requirement that an excipient in a case like this

“must make out a very clear, strong case of substantial embarrassment before he should be allowed to succeed”,

as stated in **Francis v Sharp and Others**³⁷ and in **Trustees: Bus Industry Restructuring Fund v Breakthrough Investments CC**³⁸. In my view the First Defendant has not made out such a case and the exception can therefore not succeed.

[50] There is no reason for costs not to follow the normal practice.

WHEREFORE the following order is made:

³⁶ Imprefed (Pty) Ltd v National Transport Commission, 1993 (3) SA 94 (A) at 107 C - E

³⁷ 2004 (3) SA 230 (C)

³⁸ 2008 (1) SA 67 (SCA)

1. The exception raised by the First Defendant is dismissed with costs, including the costs occasioned by the employment of two counsel, of which one is a Senior Counsel.

MURRAY, AJ

On behalf of the Plaintiff : Adv C Ploos van Amstel SC and
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