IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

APPEAL CASE NO: 44352/13

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: ~~YES~~ / NO.	
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.	
(3) REVISED.	
19/03/2015	
DATE	SIGNATURE

19/3/2015

IN THE MATTER BETWEEN

JACOBUS SPANGENBERG N.O. — Applicant/Defendant

and

WILLEM FERDINAND KIRSTEN — Respondent/Plaintiff

JUDGMENT

LEGODI, J

[1] This is an exception taken against conditional particulars of claim in an action instituted by Mr Willem Ferdinand Kirsten, an auditor by profession. The defendant in the conditional claim is Jacobus Spangenberg N.O. sued in his capacity as an executor

of the estate of the late Francois Du Preez (the deceased) who was also an auditor by profession.

[2] The plaintiff had previously worked with the deceased in an auditors' firm called F du Preez GR SA. This was during 1998. He worked with the deceased until somewhere in 2004 when he left the deceased's firm to work elsewhere in Polokwane also as an accountant.

[3] Before he left, he had already concluded an oral agreement with the deceased in terms of which the plaintiff and one Mr Conrad Fourie who was also employed in the deceased's firm, purchased the firm, Francois du Preez GR(SA) for an amount of R1 000 000. The purchase price was payable upon the death of the deceased. For this purpose, a life policy to the value of R1 000 000 was taken on the life of the deceased with Sage Life. The deceased was responsible for the payment of the premiums.

[4] In a meeting of the 17 May 1999, the deceased, the plaintiff and Mr Conrad Fourie reduced their agreement into writing. On the 8 December 2005, Mr Conrad Fourie ceded all his rights to the plaintiff. The deceased died on the 22 July 2010. On the 8 September 2010, the insurance company, that is, Momentum Life made a payment of R1 000 000 to the plaintiff in terms of the policy. Momentum Life had taken over the policy from Sage Life.

[5] After the death of the deceased and after payment of the R1 000 000 to the plaintiff, the plaintiff failed to make payment to the estate of the deceased. The executor of the estate, the defendant in the present action instituted an action (first action) against the plaintiff in terms of which the R1 000 000 paid is claimed. The plaintiff had already pleaded in the first action.

[6] On the 19 July 2013, the plaintiff instituted the present action against the defendant (the plaintiff in the first action) in his capacity as the executor. The action is framed as a "conditional claim", in terms of which, the amount of R1 000 000 is claimed. It is this action against which an exception has been noted. Several grounds for the exception are raised, about 24 in number. They all revolve around paragraph 6 of the conditional particulars of claim, in particular paragraphs 6.1 and 6.2 thereof. Paragraph 6 reads in Afrikaans as follows:

"6. *Die koopsaak (die oudieteursfirma waarna verwys word in die Verweerder se gewysigde besonderhede van vordering in die eerste ingestelde aksie) het defekte gehad wat, objektief beskou, die koopsaak se waarde en effektiwiteit asook die koopsaak se gebruiksaamheid en geskiktheid vir die doel waarvoor dit anngekoop was, negatief beïnvloed het. Hierdie defekte het bestaan op of ongeveer 20 November 1998 en daarna en spesifiek gedurende of ongeveer die tydstip waarop enige ooreenkoms met betrekking tot die aankoop van die ouditeursfirma aangegaan was. Hierdie defekte was ween of meer of al van die volgende gewees:*

6.1 Die oorledene het onregmatiglik, en opsetlik alternatiewelik nalatiglik oor 'n tydperk van etlike jare voor en tydens die datum 20 November 1998 geld wat aan hom toevertrou was in sy hoedanigheid as beheerder en bestuurder en eienaar van die koopsaak (die ouditeursfirma Francois de Preez GR (SA) vir himself geneem en/of wanaangewend;

6.2 Die oorledene het deur sy opsetlike alternatiewelik natlatjie en onregmatige optrede, voor en tydens 20 November 1998, veroorsaak dat die koopsaak se waarde dramaties afneem deurdat die oorledene die ouditeursfirma onvoldoende en/of onvolledid en/of nie behoorlik nie, bestuur, beheer en/of bedryf het en deurdat die oorledene die sake en belange van die kliënte van die ouditeursfirma wesenlik afgeskeep het, tot so 'n mate dat die kliëntetal van die ouditeursfirma dramaties afgeneem het voor en tydens en na die datum 20 November 1998.

6.3 Die defekte voormeld was latent.

6.4 Die waarde van die koopsaak (die ouditeursfirma) tesame met die defekte voormeld was Rnil alternatiewelik was die outditeursfirma se waarde nominal gewees (R100 of sodanige ander bedrag as wat deur die agbare Hof bevind mag word).

[7] The point taken is that the averments in subparagraphs 6.1 and 6.2 are vague and embarrassing. An exception is a legal objection to the opponent's pleadings. It complains of a defect inherent in the pleading, admitting for the moment that allegations in the particulars of claim or declaration or plea are true. It asserts that even with such admission, the pleading does not either disclose a cause of action or a defence as the case may be[1]. It follows that, where an exception is taken, the court must look at the pleaded exception as it stands[2]. No facts outside those stated in the pleading can be brought into the issue, except in the case of inconsistency[3]. Whenever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.

[8] An exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action. It goes to the whole cause of action, which must be demonstrated to be vague and embarrassing[4]. The exception is intended to cover the case where, although a cause of action appears in the particulars of claim or declaration, there is some defects or incompleteness in the manner in which it is set out, which results, in the embarrassment to the defendant[5]. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity[6]. Non-compliance with the Rules will amount to vagueness and embarrassment.

[9] An exception that a pleading is vague or embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged[7]. The effect of this is that the exception can be taken only if the vagueness relates to the cause of action. The defendant/excipient's counsel in the present case argued that the particulars of claim as pleaded in subparagraphs 6.1 and 6.2 do not meet the requirements in sub-rules (6) and (10) of Rule 18. The two sub-rules read as follows:

> *"(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*

---

[1] *Steward v Botha* 2008 (6) SA 310 (SCA) at 313 f.
[2] *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) at 32 D-E.
[3] *Soma v Morulane NO. 1975 (3) SA 53 (T).*
[4] *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W).
[5] *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 268F.
[6] *See Trope* at 269 I.
[7] *Gallagher Group Ltd v IO Tech Manufacturing (PTY) Ltd* 2014 (2) SA 157 GNP at 166 G-H.

and if a contract is written a true copy thereof or of the part relied on in the pleading, shall be annexed to the pleading.

(10) A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for-

(a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of-

(i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

(ii) the enjoyment of amenities of life (giving particulars);

and stating whether the disability concerned is temporary or permanent; and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent".

[10] The contention by counsel on behalf of the defendant was that the plaintiff had failed to meet any of the requirements set out in sub-rule (6). I cannot agree with this submission. There are two actions involving the two parties. The first one was an action instituted by the executor on behalf of the estate of the deceased. The second action is the present one instituted by the plaintiff who is the defendant in the first action. In his particulars of claim, the plaintiff refers to the averments made in the first action where the oral agreement and reduced into writing in a document signed by all the parties on

the 17 May 1999 is pleaded. He pleaded by incorporating the contents thereof as pleaded in the first action. Based on all these, the provisions of sub-rule (6) of Rule 18 should be found to have been complied with and there is therefore no basis to attack the particulars of claim that they are vague and embarrassing for non-compliance with the provisions of sub-rule (6). The terms of the agreement are as pleaded in the first action are incorporated in the present action.

[11] As regards to non-compliance with sub-rule (10), the suggestion was that sub-paragraphs 6.1 and 6.2 of the conditional particulars of claim lack the necessary averments to comply with what is provided in the sub-rule.. That is, the plaintiff is claiming damages based on the alleged auditor's firm having no value at all or that at least its value amount to R100. The contention was that the damages are not set out in such a manner as will enable the defendant reasonably to assess the quantum. That is, the basis on which it is alleged that the value of the firm as at the time of the death of the deceased and at the time the plaintiff took over was nil or R100 is not set out with sufficient particularity to enable the defendant to make a determination as to how the nil or R100 value was arrived at.

[12] The test applicable in deciding an exception based on vagueness and embarrassment arising out of such lack of particularity, of relevance to the present case, can be summed up as follows:

> First, in each case, the court is obliged first of all to consider whether the pleading does lack particularity to extent amounting to vagueness. If a statement is vague, it is either meaningless or capable of more than one meaning. Put simply, the reader must be unable to distil from the statement a clear single meaning.
>
> Second, if there is vagueness in this sense, the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of[8]. It must be shown that the excipient will be substantially embarrassed by the vagueness or lack particularity.
>
> Three, in each case an *ad hoc* ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is

[8] *See Venter and Other* supra at 644 A-B.

compelled to plead to the pleading in the form to which he objects[9]. The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudicial. The onus is the excipient to show both vagueness amounting to embarrassment and embarrassing amounting to prejudice[10].

[13] Now coming back to the pleading complained of, that is subparagraphs 6.1 and 6.2, it is important to remember that an exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action. It goes to the whole cause of action which must be demonstrated to be vague and embarrassing. Whilst the defendant's counsel confined himself to subparagraphs 6.1 and 6.2, the enquiries must go beyond just these two subparagraphs. What was pleaded preceding subparagraphs 6.1 and 6.2 in paragraph 6, is very important. It explains the cause of action and the subparagraphs under paragraph 6, all of them seek to explain the grounds upon which it is alleged that the deceased conducted the firm as a going concern in a manner that rendered it valueless resulting in latent defects of the business, which defects are set out in the subparagraphs up to subparagraph 6.4. Paragraph 6 is quoted in its entirety in paragraph 6 of this judgment.

[14] What is clear from averments made in paragraph 6 is the conduct of the deceased which is alleged made the business to be of no value. The fact that there is no quantification of the nil value or R100 value, in my view, would not seriously prejudice the defendant to be unable to plead. The plaintiff could still plead. The twenty four grounds of objection raised as grounds of exception can well be suited for further particulars for the purpose of preparing for trial.

[15] Consequently, the exception is dismissed with costs.

M F LEGODI
JUDGE OF THE HIGH COURT

---

[9] International Tobacco Co of SA Ltd v Wollheim 1953 (2) SA 603 (A).

[10] *Standard Bank of South Africa Ltd v Huningdory Investments 194 PTY Ltd and Another* (NO.1) 2010 (1) SA 627 (C)

FOR THE APPLICANT/DEFENDANT: ADV. J C KLOPPER

INSTRUCTED BY: CORRIE NEL & KIE ATTORNEYS
c/o JACQUES ROETS ATTORNEYS
404 Diana Street
Lynnwood, PRETORIA
REF: J18/12/J ROETS

FOR THE RESPONDENT/PLAINTIFF: ADV. Z SCHOEMAN

INSTRUCTED BY: HUTTING ATTORNEYS
c/o COUZYN HERTZOG & HORAK
321 Middle Street
Brooklyn Square, PRETORIA
REF: MR NEL/md/Hat27/0032

JUDGMENT RESERVED ON: 02 MARCH 2015
JUDGMENT HANDED DOWN ON: MARCH 2015