

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No : A137/2013

In the appeal between:

E N FUKU

Appellant

and

I MPOKA

Respondent

CORAM:

DAFFUE, J *et* DE WET, AJ

JUDGMENT:

DAFFUE, J

HEARD ON:

9 SEPTEMBER 2013

DELIVERED ON:

19 SEPTEMBER 2013

INTRODUCTION

- [1] The material issues in this appeal are whether an exception was correctly upheld by the court *a quo* and what is the correct order to be granted in the event of a court concluding that a plaintiff's particulars of claim is excipiable.
- [2] *In casu* appellant (as plaintiff in the court *a quo*) issued summons out of the Bloemfontein Magistrate's Court against respondent (as defendant in the court *a quo*), claiming

damages in the sum of R12 738, 77 in respect of a motor vehicle collision that occurred in Bloemfontein on 13 September 2011 which according to the appellant was caused by the sole negligence of the respondent. Both parties are resident in Bloemfontein. The facts appear to be simple and the amount of the claim so small that the dispute should have been adjudicated and judgment granted long ago, even if a counterclaim would have been filed. We have been informed from the bar that trial dates in the Bloemfontein Magistrate's Court are allocated within four months of the close of pleadings. Unfortunately things turned out totally different. To avoid confusion the parties shall be referred to as appellant and respondent respectively.

- [3] This appeal is directed at the judgment of the court *a quo* dated 22 August 2012 and the reasons advanced on 16 April 2013 in terms whereof it upheld respondent's exception with costs and dismissed appellant's claim.

REASONS FOR JUDGMENT IN TERMS OF RULE 51

- [4] The court *a quo*'s reasons will be dealt with more fully *infra*, but at this stage it is regarded apposite to quote the last two paragraphs thereof, which read as follows:

"It is quite evident from the eight grounds raised by the applicant that they contend that the summons and particulars of claim of the respondents is not only vague and embarrassing, but that it also lacks the necessary averments to sustain the plaintiff's

action. What this court finds even more damaging, is that the respondents again failed to remove the cause of complaint yet again in the specified period.

No order was made in terms of rule 60(A) and thus the court can effectively skip to the notice of exception calling for the dismissal of the plaintiff's claim. Looking at the circumstances above, it is prudent for this court to uphold the said exception with costs."

GROUND OF APPEAL

[5] As will be shown *infra*, neither the particulars of claim and other documents filed, nor the procedure adopted in the court *a quo* were in accordance with the Rules of Court. Matters did not improve when the appeal was lodged. Appellant should have raised crisp and to the point grounds of appeal. See: **Killian v Geregsbode, Uitenhage** 1980 (1) SA 808 (AD) at 815C and **Songono v Minister of Law and Order** 1996(4) SA 384 (ECD) at 385C – G. Instead the notice of appeal filed on behalf of appellant consisting of nine paragraphs including eighteen sub-paragraphs in a six page document is elaborate, convoluted and not crisp and to the point. The grounds of appeal can be summarised as follows:

5.1 The court *a quo* erred in upholding the exception as the so-called notice of exception did not contain an allegation that the particulars of claim were either vague and embarrassing or lacked averments which were necessary to sustain a cause of action.

- 5.2 The appellant filed a notice of intention to amend, which was not opposed and consequently the particulars of claim were duly amended before the court *a quo* pronounced on the exception.
- 5.3 The notice of exception which contained a prayer in terms whereof appellant's claim should be dismissed with costs, was bad in law and in upholding the exception, the court *a quo* dismissed appellant's claim which it could not do.
- 5.4 At best for respondent and on the basis of a finding that the particulars of claim were excipiable, the court *a quo* should have afforded appellant an opportunity to amend his particulars of claim.

FACTUAL MATRIX

[6] The following is the factual background which culminated in the order of the court *a quo* appealed against:

- 6.1 Appellant, instructing a Hoopstad attorney, issued summons out of the court *a quo* in Bloemfontein without giving an address within 15 kilometres from the court as he was supposed to do for purposes of delivery of pleadings and other documents. Apart from the Hoopstad attorney's address, a fax number and email address were provided.

- 6.2 Respondent gave notice of intention to defend whereupon a notice in terms of Rule 60(A) was issued. This notice was drafted in Pretoria by an attorney acting on behalf of respondent, which attorney instructed a local firm as his Bloemfontein correspondents. It is unclear at which address this notice was served upon appellant's attorneys, if at all, but indications are that it was faxed on 4 June 2012 to a fax number, the owner of which has not been identified.
- 6.3 On 27 June 2012 a notice of exception was issued on behalf of respondent, but there is also no indication as to when service thereof was effected. It is presumed that the notice was sent per mail to appellant's attorney in Hoopstad.
- 6.4 Respondent relied on eight grounds for the conclusion that plaintiff's summons (presumably the particulars of claim) constituted an irregular step for purposes of Rule 60(A). Exactly the same eight grounds were relied upon in the notice of exception. I shall deal later herein in more detail with these grounds.
- 6.5 Respondent did not indicate in her notice of exception whether she relied upon the fact that the summons and/or particulars of claim were vague and embarrassing and whether it was her case that no cause of action was pleaded. Appellant was informed

in the notice of exception that respondent intended to apply to the court *a quo* on 19 July 2012 “for an order dismissing the plaintiff’s claim with costs”.

- 6.6 On 19 July 2012, being the day on which respondent intended to apply for dismissal of appellant’s claim, a notice of intention to amend the particulars of claim was served upon respondent’s attorneys. A Bloemfontein firm of attorneys was cited as appellant’s attorneys of record, whilst the name of the Hoopstad firm of attorneys also appeared on the document.
- 6.7 On 19 July 2012 the court *a quo* postponed the application to 26 July 2012.
- 6.8 On 20 July 2012 appellant’s Bloemfontein attorneys of record came officially on record for the first time. By now four sets of attorneys were involved whilst the parties reside in Bloemfontein and the whole cause of action arose in this district.
- 6.9 The matter was not argued on 26 July 2012, but postponed and argued on 2 August 2012 only.
- 6.10 On 8 August 2012 and whilst there was no objection to appellant’s notice of intention to amend his particulars of claim which was delivered on 19 July 2012 and long before the matter was argued, the amendment was effected.

6.11 On 22 August 2012 the court *a quo* upheld the exception with costs, effectively dismissing appellant's action and on 16 April 2013 it provided reasons for judgment in terms of Rule 51. I accept that reasons were requested timeously and that being the case, it took the court *a quo* nearly eight months to provide these reasons.

RULE 60(A)

[7] Rule 60(A) is a fairly new rule based on Rule 30 of the High Court Rules and consequently the authorities applicable to Rule 30 are *mutatis mutandis* applicable to Rule 60(A). Rule 60(A) reads as follows:

"60A Irregular proceedings

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —
 - (a) the applicant has not himself or herself taken a further step in the cause with knowledge of the irregularity;
 - (b) the applicant has, within 10 days of becoming aware of the step, by written notice afforded his or her opponent an opportunity of removing the cause of complaint within 10 days; and

- (c) the application is delivered within 15 days after the expiry of the second period mentioned in subrule (2)(b).
- (3) If at the hearing of an application in terms of subrule (1) the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as it deems fit.
- (4) Until a party has complied with any order of court made against him or her in terms of this rule, he or she shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order."

[8] No party is obliged to apply to have an irregular step taken by an opponent set aside, although it is accepted that if such party is prejudiced by an irregular step, he/she should not simply treat it as a nullity and proceed as though it has not been taken, but must apply to court in terms of Rule 60(A) and allow the court to exercise its discretion to decide what is to be done in relation to the irregular step. If no substantial prejudice is caused by an irregular step, it might be better to ignore it since an application to set it aside may well be dismissed.

See: **De Klerk v De Klerk** 1986 (4) SA 424 (WLD) at 426B – I and Herbstein & Van Winsen: **The Civil Practice of the High Court of South Africa**, 5th ed, p 735 *et seq* and pp 736 and 741 in particular, as well as authorities quoted.

- [9] The following objections were raised with my comments thereto: a) the appellant failed to state his full names – he was referred to by his initials and surname only and I fail to see any prejudice; b) appellant failed to set out his business or occupation – how could respondent ever be prejudiced by this failure?; c) appellant failed to prove *locus standi* as he did not provide sufficient particulars of his ownership of the damaged vehicle – he stated that he was the owner of the vehicle which was identified by model, make, colour and registration number and nothing more was expected; d) his attorneys did not provide an address within fifteen kilometres from the court – this is true, but one telephone call might have solved the problem; e) appellant failed to aver in which town the collision occurred and also failed to set out particulars that the whole cause of action arose in Bloemfontein – it was alleged that the collision occurred at the junction of two well-known streets in Bloemfontein although appellant failed to state the name of the city, but in a further paragraph it was averred that the whole cause of action had arisen in Bloemfontein. Technically speaking there was a non-compliance, but where is the prejudice, especially insofar as respondent is a teacher resident in Bloemfontein *ex facie* the amended particulars of claim?; f) appellant failed to aver on which grounds he relied for the allegation that respondent had been negligent – this is a valid objection causing the pleading to be vague and embarrassing. See: Harms, **Amler's Precedents of Pleadings** 7th ed, p 290 and **Honikman v Alexandria Palace Hotels (Pty) Ltd** 1962 (2) SA 404 (CPD) at 406; g)

appellant failed to indicate how the *quantum* of his damages had been calculated – this was a valid objection and it might be argued that this caused the pleading to be vague and embarrassing; h) appellant failed to cite respondent's residential or business address – appellant averred that respondent had chosen a *domicilium* address in Bloemfontein, but it appears from the amended particulars of claim that this is the residential address of respondent. Fact is she received the summons and duly gave notice to defend the action. Again I fail to detect any prejudice.

Without trying to convey that all objections raised were technical in nature, it is important to heed the warning by Schreiner JA more than five decades ago in **Trans-African Insurance Co Ltd v Maluleka** 1956 (2) SA 273 (AD) at 278F – G where the learned judge stated that:

“...technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

- [10] Although in a different context, I wish to subscribe to the following *dictum* of Froneman J in **KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others** 2013 (4) SA 262 (CC) at par 80, relying on comments by Prof Cora Hoexter:

“Formalism has many meanings, but Professor Cora Hoexter helpfully describes one of its meanings as ‘a judicial tendency to attach undue importance to the pigeonholing of a legal problem

and to its superficial or outward characteristics; and a concomitant judicial tendency to rely on technicality rather than substantive principle or policy, and on conceptualism instead of common sense'.

Hoexter is further quoted as follows:

'In cases displaying formalistic legal reasoning the merits often seem strangely divorced from the outcome of the case, so that it is difficult and perhaps even embarrassing to explain the case to a layperson.'"

- [11] The object of pleadings is to define the issues. In **Imprefed (Pty) Ltd v National Transport Commission** 1993 (3) SA 94 (AD) at 107D, Kumleben JA and Nienaber JA referred with approval to **Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice**, 22nd ed at 113 and stated the fundamental principle of pleadings as follows:

"The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be obtained when each party states his case with precision."

- [12] In the event of a particulars of claim failing to comply with Rule 6 of the Magistrate Court Rules (Rule 18 of the High Court Rules) and in addition are also vague and embarrassing, the defendant may either apply to have the particulars set aside in terms of Rule 60(A), (Rule 18(12) read with Rule 30 of the High Court Rules) or take exception.

See: **Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen**
1992 (4) SA 466 (WLD) at 469J.

What is apparent *in casu* is that the respondent did not proceed with an application in terms of Rule 60(A)(2)(c). She apparently abandoned her entitlement to any relief in terms of Rule 60(A) as she, instead of proceeding with Rule 60(A) procedure, filed the notice of exception referred to above.

EXCEPTION

[13] Rule 19 of the Magistrates' Court Rules deals with exceptions and applications to strike out. The relevant parts of the Rule read as follows:

“(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of rule 55(1)(j): Provided that where a party intends to take an exception that a pleading is vague and embarrassing such party shall within the period allowed as aforesaid by notice afford such party's opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver the exception.

(2) ...

(3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.

(4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.”

[14] It is of utmost importance to differentiate between two scenarios, to wit pleadings that are alleged to be vague and embarrassing on the one hand and pleadings lacking averments necessary to sustain an action or defence on the other. If a pleading is alleged to be vague and embarrassing only, the party intending to take an exception shall, as a first and compulsory step, within the period allowed for filing of any subsequent pleading (*in casu* 20 days from delivery of the notice of intention to defend) by written notice afford the opponent an opportunity of removing the cause of complaint within 15 days. An exception can only be delivered in such a case within 10 days from the date on which a reply to the aforesaid notice is received or from the date on which such reply is due. This is the second step in the process. Thus, in cases where the pleading is merely vague and embarrassing, a two stage procedure is required.

If the pleading lacks averments which are necessary to sustain an action or defence, an exception shall be delivered within the period allowed for filing any subsequent pleading and the matter may be set down for hearing. No notice to remedy the defect is required in this instance.

[15] *In casu* respondent did not indicate at all in the notice of exception whether she relied on the fact that the particulars of claim were vague and embarrassing or whether it lacked averments which were necessary to sustain an action. Bearing in mind the various allegations regarding non-compliance with the Rules of Court and the grounds which were similar to those relied upon in the notice in terms of Rule 60(A), one would have expected respondent to rely on the fact that the particulars of claim were vague and embarrassing. As indicated *supra* six of the eight grounds were really technical in nature and appellant's failure could not have caused any material prejudice. The other two grounds might be deemed to render the particulars of claim vague and embarrassing. However sufficient facts were pleaded to sustain a cause of action.

[16] An exception that a pleading is vague and embarrassing should not be allowed, unless the excipient would be prejudiced if the offending allegations are allowed to remain. The vagueness and embarrassment must also strike at the root of the cause of action or defence as pleaded.

See: **Levitan v Newhaven Holiday Enterprises CC** 1991 (2) SA 297 (CPD) at 298A – D and **Jones and Buckle, The Civil Practice of the Magistrates' Courts in South Africa** loose-leave ed, vol 2, p 19-6A.

In casu no notice was given to remedy any vagueness or embarrassment in terms of the proviso to Rule 19(1). The

notice in terms of Rule 60(A) could not be relied upon for purposes of exception.

- [17] It is apposite to quote the following *dictum* of Gamble J in **MN v AJ** 2013 (3) SA 26 (WCC), relying on **Suid-Afrikaanse Onderlinge Brand- en Algemene Versekerings-maatskappy Bpk v Van den Berg en 'n Ander** 1976 (1) SA 602 (A) at 607E:

“[24] While pleadings must be drafted carefully, a court should not read them pedantically nor should it overemphasise precise formalistic requirements: the substance of the allegations should be properly considered.”

Gamble J continued as follows:

“[25] Where a pleading lacks the necessary allegations to substantiate the claim or the defence (as the case may be), the opposing party can of course give consideration to noting an exception. In terms of rule 17(5)(c) of the magistrates' court rules (prior to the recent amendment of the rules) a defendant who wishes to raise an exception must first give the plaintiff notice and an opportunity to remove the cause of complaint. Further, the magistrate shall not uphold an exception to the particulars of claim unless he or she is satisfied that the defendant would be prejudiced in the conduct of his/her defence if the summons were to be permitted to stand.”

- [18] A party who receives a notice in terms of the proviso to Rule 19(1) of the Magistrates' Courts Rules (Rule 23(1) of the High Court Rules) affording an opportunity to remedy a pleading that is alleged to be vague and embarrassing and who concedes that the pleading is defective, may rectify such defect by amending the pleading.

See: **National Union of South African Students v Meyer; Curtis v Meyer** 1973 (1) SA 363 (TPD) at 364D – 367D.

If despite the amendment, the embarrassment remains real, the other party should proceed with the second stage of exception procedure. It often happens that when an exception is taken on the basis that a pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, the other party conceding this to be the case, gives notice of intention to amend and in the event of no opposition, causes the amendment to be effected prior to the exception being argued. Generally in such an instance the excipient would be entitled to his costs and if there is no agreement to that effect, costs is the only aspect to be adjudicated upon if the defect has been remedied. The court *a quo*'s viewpoint that the appellant's notice of intention to amend could not be seen as rectifying the cause of complaint as he was already out of time to do so is without substance. The same applies to the version that appellant had to bring a condonation application for the alleged late filing of the notice of intention to amend. It is clear from the reasons of the court *a quo* that when the exception was

argued, it was submitted on behalf of appellant that leave should be granted to amend, but notwithstanding this the court *a quo* found that “plaintiff cannot proceed any further without applying for leave to amend in terms of Rule 55(A)”. This is without foundation and I shall refer to the relevant authorities in the next paragraph. I have already in the introduction quoted the last paragraph of the court *a quo*’s reasons, but repeat the following sentence:

“What this Court finds even more damaging, is that the respondents again failed to remove the cause of complaint yet again in the specified period.”

Fact of the matter is that when the court *a quo* granted its order, the amendment had already been effected as there was no opposition to the notice of intention to amend. Contrary to the initial particulars of claim which did not comply with the Rules of Court the amended particulars of claim cannot be faulted.

- [19] It is a long standing practice that in the event of a court upholding an exception to particulars of claim, to grant leave to the respondent to amend his or her pleading within a specified time. As Corbett CJ stated in **Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)** 1993 (2) SA 593 (AD) at 602J - 603A:

“An order dismissing an action puts an end to the proceedings and means that if the plaintiff wishes to pursue his claim on a different pleading he must start *de novo*. This may have drastic consequences for the plaintiff, particularly where it results in the prescription of the claim. In my opinion, it would be contrary to the general policy of the law to attach such drastic consequences to a finding that the plaintiff's pleading discloses no cause of action.”

See also **Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd** 1993 (3) SA 424 (AD) at 431B – G.

- [20] If an exception is upheld to the effect that the plaintiff's particulars of claim does not sustain a cause of action, a court should not dismiss the action as respondent requested the court to do *in casu* and the court *a quo* incorrectly adhered to. The usual order is to set aside the pleading – the particulars of claim *in casu* - with leave to amend if so advised.

See: **Rowe v Rowe** 1997 (4) SA 160 (SCA) at 167G – I and **Group Five Building Ltd** *supra* at 602D.

- [21] Heher JA, writing for the Full Bench of the SCA in **Constantaras v BCE Foodservice Equipment (Pty) Ltd** 2007 (6) SA 338 (SCA), commented as follows at p 348E – G:

“In argument counsel submitted that the rule is that a party whose pleading is struck down on exception is afforded such an opportunity as a matter of course.

[31] That is certainly true of a successful exception to a summons: *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602I - 603J. Such a rule is both understandable and necessary. Such an exception can never put an end to the dispute if a plaintiff has a viable alternative basis for its claim; even though the original claim is struck down without leave to amend, the plaintiff can always issue a new summons in which the alternative is pleaded. So refusing an amendment is merely a waste of costs.”

Herbstein & Van Winsen *loc cit* at 646 also refer to the relevant authorities and long standing practice of our courts to allow a party to file an amended pleading in the event of an exception being upheld, as an invariable practice of the courts. As Jones And Buckle puts it at p 19-4: “Where an exception is upheld it is the pleading to which exception is taken which is destroyed. The remainder of the edifice does not crumble. The upholding of an exception to a declaration or particulars of claim does not therefore carry with it the dismissal of the summons or of the action.”

[22] In **Trope and others v SA Reserve Bank** 1993 (3) SA 264 (AD) at 269H - I the court held that the aforesaid practice applies *a fortiori* when an exception is granted on the ground that a pleading is vague and embarrassing.

CONCLUDING REMARKS

[23] The court *a quo* misdirected itself in at least four respects, to wit:

23.1 In considering and dealing with the application in terms of Rule 60(A) as it was totally irrelevant to the adjudication of the matter. It was not possible to rely on a hybrid procedure as the court *a quo* apparently found acceptable. The following remarks are indicative of the wrong approach adopted by the court *a quo*: *“Now it is clear that the applicant by serving a notice in terms of Rule 60A was gracious enough to let the respondent know what was sorely lacking in the summons and particulars of claim and effectively in doing so, allow them time to remove the cause of complaint. The respondent however failed to make use of the opportunity to remove the cause of complaint which then led to the applicant filing the notice of exception to dismiss the plaintiff’s claim.”*

23.2 In neglecting to accept that appellant has in fact amended its particulars of claim prior to the pronouncing of its order and insisting that a condonation application was required insofar as the “application for leave to amend” was filed out of time and that a Rule 55(A) application could not be entertained at that stage. Firstly, respondent did not oppose the notice of intention to amend and secondly, no formal application in terms of Rule 55(A) was required as appellant was entitled to effect the amendment in terms of Rule 55(A) (5) and (7) which he did.

23.3 In upholding the exception whilst the document relied upon by the respondent, the so-called notice of exception, was totally defective insofar as there was no indication whether reliance was placed on vague and embarrassing particulars of claim or whether the particulars of claim did not sustain a cause of action. At best for respondent the particulars of claim prior to amendment were vague and embarrassing, and that being the case, notice to remedy should have been given in terms of the proviso to Rule 19(1) which respondent failed to do and consequently the exception was prematurely set down.

23.4 Finally, but most importantly, and even on the basis that a proper notice in terms of the proviso to Rule 19(1) was given to which appellant did not respond timeously, (which is clearly not so), it could not dismiss the appellant's action, but the exception might have been upheld (whereby the pleading would be set aside) with costs and leave be granted to appellant to amend his particulars of claim within a certain period.

[24] Mr Qwelane who argued the matter on behalf of respondent, submitted that the exception should have been upheld, but that the court *a quo* should have granted leave to appellant to amend the particulars of claim as the amendment filed by the appellant constituted an irregular step. According to his heads of argument

“pending exception kept all other steps to amend pending up until the court had pronounced itself therein”. (sic)

He argued that the appeal should succeed in part, but that no costs should be awarded to appellant at this stage as the costs of the appeal should be costs in the magistrates’ court action. There is no merit in this submission. The appeal should succeed and respondent be ordered to pay the costs of the appeal as well as the costs attendant to the exception procedure in the court *a quo*.

In conclusion I should mention that respondent applied for condonation pertaining to the late filing of heads of argument. Attached to the application was a letter from the Pretoria attorney indication that respondent agreed to abandon the judgment of the court *a quo*, but refused to pay the costs of appeal. This letter is dated 28 August 2013 and the condonation application was filed on 2 September 2013, a week before the hearing of the appeal. Costs were already incurred and appellant’s counsel would by then be entitled to two thirds of his day fees. No notice that the said judgment was abandoned was ever filed in terms of s 86 of the Magistrates’ Courts Act, 32 of 1944, read with Rule 51 (11)(a). In any event the judgment should have been abandoned more than a year ago. Notwithstanding the above indications respondent’s attorney in his written heads and during oral argument submitted that the exception was correctly upheld, although he conceded that leave should have been granted to amend.

ORDER

[25] The following orders do issue:

25.1 The appeal succeeds with costs.

25.2 The order of the Magistrates' Court is set aside and the following order substituted:

"The exception is dismissed with costs, excluding the wasted costs occasioned by the postponement on 19 July 2012."

J.P. DAFFUE, J

I concur.

P.J.T. DE WET, AJ

On behalf of appellant: Adv P.J. Heymans
Instructed by:
E G Cooper Majiedt Inc
BLOEMFONTEIN

On behalf of respondent: Mr D Qwelane
Instructed by:
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