

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 541/2008
Case Heard: 20/03/2009
Date delivered: 27/03/2009

In the matter between:

CMH CAR HIRE (PTY) LTD t/a
NATIONAL CAR RENTAL

PLAINTIFF

and

SIYANDA DISTRICT MUNICIPALITY
JAMES PETRUS MAPANKA
DAVID GEORGE LYONS
JACOBUS GILBERT LATEGAN
LENNOX HORING

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT
5TH DEFENDANT

JUDGMENT

Olivier J:

1. The plaintiff, CMH Care Hire (Pty) Ltd t/a National Car Rental SA, issued summons against the Siyanda District Municipality (1st defendant), mr James Petrus Mapanka (2nd defendant), mr David George Lyons (3rd defendant), mr Jacobus Gilbert Lategan (4th defendant), and mr Lennox Horing (5th defendant).
2. In broad terms the plaintiff's case is the following:

- 2.1. In a credit agreement concluded between the plaintiff and the first defendant on 24 November 2004 it was agreed that the first defendant would be liable for all "*charges*" incurred through the use of certain vouchers.
- 2.2. The second and third defendants (employees of the first defendant) had bound themselves as sureties and co-principal debtors for all amounts which were or would in future become due and payable by the first defendant to the plaintiff.
- 2.3. On 10 August 2005 a rental agreement was concluded between the plaintiff and the first defendant, alternatively the fourth defendant (also an employee of the first defendant).
 - 2.3.1. In concluding the rental agreement the fourth defendant, acting either on behalf of the first defendant or in his personal capacity, made use of a voucher as envisaged in the credit agreement.
 - 2.3.2. In terms of the rental agreement the first defendant, alternatively the fourth defendant, hired a vehicle from the plaintiff and would be liable for all damages incurred by the plaintiff should the vehicle not be returned in the same

condition that it was received in, except insofar as any of the indemnities provided for in clauses 9 and 10 of the rental agreement applied.

- 2.4. The vehicle was not returned as agreed and had in fact been damaged beyond economical repair in a collision, resulting in damages in the amount of R164 500,00.
- 2.5. The plaintiff claims payment of this amount and alleges that the first defendant is liable "*in terms of the credit application agreement, read with the rental agreement*", and that the second and third defendants would then be liable in terms of the suretyship.
- 2.6. In the alternative, and should the first defendant be found not to be liable (and therefore also the second and the third defendants), the plaintiff alleges that the fourth defendant would be liable in his personal capacity, in terms of the rental agreement.
- 2.7. In the further alternative, "*and in any event against the Fifth Defendant*", the plaintiff pleads that either the fourth defendant or the fifth defendant (also an employee of the first defendant) had caused the damages through negligent driving of the vehicle, and that the fourth defendant, alternatively the fifth defendant, should on that basis be held liable for the plaintiff's damages.

3. Copies of the so-called credit application agreement, the suretyship, the "*MANUAL RENTAL AGREEMENT*" and the "*TERMS AND CONDITIONS OF THE RENTAL AGREEMENT*" were annexed to the particulars of claim as, respectively, annexures A, B, C and D.
4. The defendants excepted to the particulars of claim on the basis that it is in some respects vague and embarrassing and that, in other respects, it lacks the necessary averments to sustain a cause of action.

VAGUE AND EMBARRASSING

5. The first complaint in this regard concerns the allegations in the particulars of claim that:

"In concluding the credit application agreement:

(a) *The Plaintiff was represented by a duly authorised employee;*

(b) *The First Defendant as represented by the Second Defendant and/or the Third Defendant."*

6. In its notice in terms of Rule 23(1) the plaintiff states that these allegations do not comply with Rule 18(6) "*in that it does not disclose who represented either of the parties in concluding the agreement*".
7. The mere fact of non-compliance with Rule 18(6) would not render such an allegation vague and embarrassing and, should it

not be vague and embarrassing because of some other reason, such an allegation would not be excipiable and the only remedy would be to follow the procedure provided for in Rule 30 (see **Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen** 1992 (4) SA 466 (W) at 469-470, **Absa Bank Ltd v Boksburg Transitional Local Council (Government of the Republic of South Africa, Third Party)** 1997 (2) SA 415 (W) at 418, **Jowell v Bramwell-Jones and Others** 1998 (1) SA 836 (W) at 902, **Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing en Andere** 2001 (2) SA 790 (T) at 796 and **Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd** 2008 (4) SA 639 (C) para [16]).

8. This would probably explain why, in heads of argument on behalf of the defendants, it was then submitted that these allegations do "*not disclose the necessary information required (sic) in precise terms*" and that accordingly the defendants are unable to plead thereto.
9. As far as the representation of the first defendant is concerned, I fail to understand why the plaintiff would not have been entitled to make the alternative allegations that either the second or the third defendant had represented the first defendant. The particulars of both the second and third defendants can be found in paragraphs 3 and 4 of the particulars of claim.
10. As regards the representation of the plaintiff in the credit agreement, the question whether the allegation that the plaintiff was represented by a duly authorised employee complied with Rule 18(6), the problem is that this is not an application to have

the particulars of claim set aside as an irregular step. It is an exception and, even if the failure to provide particulars of the employee who had represented the plaintiff could be viewed as non-compliance with Rule 18(6), this would not in itself render such allegation vague and embarrassing.

11. In my view the allegation that the plaintiff had been represented by a duly authorised employee, contains sufficient particularity to respond thereto in the form of a plea without any apparent and serious prejudice (see **Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd, supra**, para [25]). Put another way, the defendants have failed to satisfy me that, without further particulars thereto, they will be "*embarrassed in pleading*" and that further particulars of the employee "*are strictly necessary to enable (them) to plead ...*" (see **Jowell v Bramwell-Jones and Others, supra**, at 902A-C).
12. Whether the person who had concluded the contract on behalf of the plaintiff had been properly authorised to do so, would appear to be part of the *facta probantia* required to prove the allegation that a valid contract was concluded (see **Jowell v Bramwell-Jones and Others, supra**, at 903A-B).
13. The second complaint in this regard is directed at a similar allegation, as far as the representation of the plaintiff in the rental agreement is concerned, and what has already been said above applies also to this complaint.

LACK OF AVERMENTS REQUIRED TO SUSTAIN ACTION

14. The defendants' complaint in this regard is, in the first place, that the "*plaintiff fails to indicate on what legal basis the 'charges' ... includes damages which may be sustained by the use of the vouchers and/or orders*".
15. In this regard the test would be whether the defendants have satisfied the Court that the particular clause in the credit agreement, when read with the rental agreement, could on no interpretation at all be read to mean that the use of the vouchers would render the first defendant liable for damages (see **Trustees, Bus Industry Restructuring Fund v Break Through Investments CC and Others** 2008 (1) SA 67 (SCA) at 74I, **Couve and Another v Reddot International (Pty) Ltd and Others** 2004 (6) SA 425 (W) para [2] and **Frank v Premier Hangers CC** 2008 (3) SA 594 (C)).
16. In my view the defendants have not succeeded in doing so. The plaintiff has made the allegation, in this regard, that the credit agreement should be read with the rental agreement. In this regard it is of interest to note that the same account number (SIY 002 B) appears in both these annexures.
17. The rental agreement does provide for liability for damages and it is of interest to note that, in terms of clause 5.1 of the rental agreement, such charges would include the costs of "*repairs, replacements*".
18. In clause 2.2 of the rental agreement it is provided that the damages to which the plaintiff would be entitled would include "*repairing any damages, replacing parts, replacing the vehicle*".

19. Once it is accepted that the rental agreement should be read with the credit agreement, the possibility (and I need not put it any higher than that) that the charges envisaged in the credit agreement would include damages, could not be ruled out.

20. The second ground upon which the defendants contend that the summons lacks averments required to sustain a cause of action, is that, while pleading that the rental agreement did provide for the possibility of indemnity against a claim for damages:

"4.3 Plaintiff fails to plead that a collision damage waiver was indeed taken out to indemnify the defendants in the event of a collision.

4.4 Plaintiff fails to plead any facts why the indemnities provided for in clause 9 and 10 should not operate in favour of the Defendants."

21. The relevant paragraph of the particulars of claim reads as follows:

"Save to the extent of the indemnities provided for in clauses 9 and 10 of annexure 'D', the First Defendant, alternatively the Fourth Defendant, would be liable to the Plaintiff for any damages to the motor vehicle if the motor vehicle was not returned in the condition described in the previous subparagraph."

22. The plaintiff was not obliged to plead *"information which forms no part of the plaintiff's cause of action as formulated"* or information to enable the defendants *"to ascertain whether (they have) a defence to the claim, or to formulate such a defence"*

(see **South African Railways and Harbours v Deal Enterprises (Pty) Ltd** 1975 (3) SA 944 (W) at 947-948, **Swil v Swil** 1978 (1) SA 790 (W) at 792 and **Insamcor (Pty) Ltd v Maschienenfabriek Sidler Stalder AG t/a Sistag** 1987 (4) SA 660 (W) at 664).

23. The fact that the general possibility of such an indemnity (under certain circumstances) has been pleaded is a *plus petitio*. The existence of a term providing for indemnity under particular circumstances could never be said to be a part of the plaintiff's cause of action and the pleading thereof could never have been required to sustain the plaintiff's cause of action. The pleading of this term could therefore not render the particulars of claim excipiable (compare **Anglo African Shipping Co (1936) Ltd v Harris and Others** 1977 (2) SA 213 (W) at 217).
24. The terms concerning such an indemnity are in any event contained in the "*TERMS AND CONDITIONS OF THE RENTAL AGREEMENT*", a copy of which document is annexed to the particulars of claim as annexure D.
25. It is so that it would appear, *ex facie* the document titled "*MANUAL RENTAL AGREEMENT*" (annexure C to the particulars of claim) and the contents of annexure D, as though so-called collision damage waiver (CDW) had been taken out when the vehicle was hired. In terms of clause 10.3 of annexure D "*Such CDW will cover any damage to the vehicle incurred in a collision with another vehicle on a National or Municipal road (excluding gravel, dirt or rural roads)*".
26. There is no indication in the particulars of claim or in the annexed documentation that the vehicle was damaged in a

collision "*with another vehicle*" or on what type of road the vehicle was damaged. It therefore cannot be said that the particulars of claim disclose a *prima facie* defence which the plaintiff had to exclude by reasons of further averments. It was not necessary for the plaintiff to anticipate what defence/s the defendants may raise and to counter them in its particulars of claim.

27. These terms are, as already mentioned, contained in the document titled "*TERMS AND CONDITIONS OF THE RENTAL AGREEMENT*", annexure D to the particulars of claim. In the heads of argument on behalf of the defendants it is submitted that the plaintiff failed to plead that the defendants had accepted the terms and conditions contained in annexure D, that it was clear *ex facie* that document that it had not been signed by the defendants and that the terms and conditions in annexure D can therefore not be regarded as part of the rental agreement.
28. There is absolutely no merit in this submission. In its particulars of claim the plaintiff made the express allegations that:

"The rental agreement consists of:

- (a) A document headed 'manual rental agreement', a copy of which is annexed hereto marked 'C'; and*
- (b) The 'terms and conditions of the rental agreement', a copy of which is annexed hereto marked 'D'."*

29. It was not required of the plaintiff to plead the evidence which will be required to prove that the defendants had indeed accepted the terms and conditions as set out in annexure D (see

Jowell v Bramwell-Jones and Others, supra, at 903A-B and **Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd, supra**, at 646E-F).

30. The fact that annexure D may not have been signed by or on behalf of the defendants is not conclusive at all and would not prevent the plaintiff from presenting evidence to substantiate its allegation that the contents of annexure D do indeed form part of the rental agreement. In this regard it should be noted that, in clause 1.1 in annexure D, it is stated that "*These are the terms and conditions of the rental agreement **on the face of this document***" (my emphasis). It would not, I imagine, be difficult for the plaintiff to prove that the copy annexed to its particulars of claim as annexure D is in fact merely the reverse side of the manual rental agreement (annexure C), which does contain the signature of a "Renter" and at the foot whereof (just above the signature of the renter) the words "*I have read and understood the terms and conditions on the reverse side of the Rental Agreement*" appear.
31. The defendants appear to have overlooked the fact that although the plaintiff alleges that annexure A to its particulars of claim is a "*credit application agreement*", the copy annexed as annexure A purports to be only an application for credit, does not reflect the granting thereof or the agreement thereto by the plaintiff and can in itself accordingly not be said to be a copy of any agreement at all.
32. Be that as it may, it follows that the exception cannot in my view succeed on any of the grounds taken by the defendants. There is no reason why costs should not follow the result.

33. It is unnecessary to consider whether the absence of a prayer in the notice of exception caused the plaintiff any prejudice (compare **Soma v Morulane** 1975 (3) SA 53 (T) and **Frankel Pollak Vindirine Inc v Stanton** NO 2000 (1) SA 425 (W) at 452).
34. In the premises the following order is made:

The exception is dismissed with costs.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Plaintiff:	Adv P R Cronje
Instructed by:	Fletcher's KIMBERLEY
For the Excipients:	Adv F G Janse van Rensburg
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