

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case Nr.: 3484/2003

In the matter between:

ALBERTUS JOHANNES BADENHORST Plaintiff

And

MALUTI-A-PHOFUNG MUNICIPALITY Defendant

JUDGMENT: EBRAHIM J

HEARD ON: 20 AUGUST 2004

DELIVERED ON: 9 SEPTEMBER 2004

[1] This is an exception taken by the defendant to the plaintiff's particulars of claim on the grounds that same are vague and embarrassing.

[2] The Notice of Exception was preceded by a notice to remove the cause of complaint delivered in terms of the provisions of rule 23(1) of the Uniform Rules of this Court. Subsequent to

the delivery of such notice the plaintiff amended its particulars of claim which amendment in some measure addressed the complaints in the Notice referred to. It is to the amended summons that the exception is now taken.

- [3] The summons brings two claims. The first is brought in respect of remuneration, telephone allowances and medical and pension contributions pursuant to an oral agreement concluded in October 2001. The second claim is in respect of a further agreement concluded in December 2001 modifying the earlier agreement in terms of which the defendant was to reimburse the plaintiff for any shortfall between expenditure incurred by the plaintiff in defendant's farming activities and the proceeds thereof.

- [4] The Notice of Exception is confined to three grounds less extensive than the original notice to remove cause of complaint. The first ground was abandoned by the defendant in argument and nothing further need to be said in this regard. It remains therefore for me to consider the

remaining two grounds in the Notice of Exception dated 3 March 2004 and whether or not on such grounds the particulars of claim are vague and embarrassing.

- [5] Before dealing with the grounds of exception it is necessary to summarise the applicable principles. These are listed in **Erasmus, Superior Court Practice** at B1 154 to B1 154A:

- “(a) In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning.
- b) 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 or her by the vagueness complained of.
- c) 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 or she is compelled to plead to the pleading in the form to which he or she objects. A point may be of the utmost importance in one

case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.

- d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.
- e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.
- f) The excipient must make out his or her case for embarrassment by reference to the pleadings alone."

To this must be added:

- (g) "An exception must relate to the whole of the cause of action or claim and not to a particular paragraph in the cause of action."

JOWELL v BRAMWELL JONES & OTHERS 1998 (1) SA

836 W:

- (h) "An exception must state in clear and concise terms the particulars upon which the exception is based. It is not sufficient merely to state that the particulars of claim are vague and embarrassing."

See **SYDNEY CLOW & CO LTD v MUNNIK AND
ANOTHER** 1965 (1) SA 626 A and **BOTHMA v
LAUBSCHER** 1973 (3) SA 590 O.

- (i) “The excipient is bound to the grounds of exception set out in the notice of exception and is not permitted at the hearing to rely on different grounds or raise a different exception.”

See: **INKIN v BOREHOLE DRILLERS** 1949 (2) SA 366 A

- [6] The two remaining grounds are directed at the plaintiff’s second claim. The first ground is that the oral agreement referred to by the plaintiff in the second claim is pleaded as a further agreement amending the agreement referred to in the first claim. This ground of exception seeks to draw the conclusion that effectively the obligation forming the basis of claim one lapsed in so far as the agreement pleaded in the first claim according to pleadings was replaced by the

agreement pleaded in the second claim.

- [7] In amplification of this ground Mr Zietsman for the excipient made the submission that the agreement pleaded and upon which the second claim was brought was applicable in time and period with the agreement pleaded in claim one. This apparently gives rise to a difficulty on the part of the defendant as to how to interpret the pleading and in particular whether or not the second agreement was an amendment to the first agreement or a separate agreement in its own right. Assuming this amounts to vagueness as the submission seems to imply I am not satisfied that there is vagueness amounting to embarrassment and prejudice. Whether or not the second agreement is characterized as an amendment of the first or collateral to the first is a matter of semantics as the terms of the second agreement, as pleaded, are pleaded sufficiently clearly to disclosed to the defendant the obligations alleged to be owed to the plaintiff. The particularity is sufficient for the defendant to plead issuably thereto. The second agreement clearly discloses

additional obligations of the first over and above those disclosed in the first agreement. Finally, this submission overlooks the ground of exception disclosed in paragraph 2 of the exception, namely, that the second agreement amounted to a novation of the first agreement extinguishing and replacing the first agreement. On neither of the possible interpretations put forward by Mr Zietsman in argument is it suggested that the second ground amounts to a novation of the first agreement.

- [8] The second remaining ground of exception was that the annexure to the plaintiff's particulars of claim disclosing the proceeds and expenditure of the farming operations is vague and embarrassing. Mr Zietsman submitted that the possibility existed that part of the expenditure or disbursements alleged in the annexure (Annexure "A") may be a duplication of the amount claimed by the plaintiff in claim one. Even if this was so, the amount claimed in the second claim would be an over claim and does not strike at the root of the claim as a whole.

[9] Accordingly, in my view, the two remaining grounds of exception do not disclose vagueness amounting to embarrassment nor embarrassment amounting to prejudice. The particulars of claim disclose an action with sufficient clarity to enable the defendant to plead thereto.

[10] In passing it is to be noted that the plaintiff levelled certain criticisms at the notice of exception. The first criticism was that the notice of exception did not accord with the notice to remove cause of complaint. While an excipient is perfectly at liberty to confine his/her exception to grounds narrower than those set out in the notice to remove cause of complainant, an excipient is not permitted to introduce further grounds of vagueness and embarrassment in respect of which the other party has not been given an opportunity to remove the additional cause of complaints, as such would not comply with the provisions of rule 23(1). The second criticism is that the exception did not contain a prayer for relief. An exception which lacks a prayer is bad in law but the Court

has the power to order an amendment to make good the defect provided no prejudice or injustice is caused to the respondent. See **MARAIS v STEYN EN 'n ANDER** 1975 (3) SA 479 T at 483 A where it was held that the absence of a prayer in an exception was “die toppunt van die slordigheid wat die eiser se pleitstukke kenmerk”.

- [11] The defendant filed a notice of intention to amend its exception by the introduction of a prayer. This notice was not objected to by the plaintiff. The defendant nevertheless failed to deliver amended pages in this regard. Accordingly no amendment was effected. See **VAN HEERDEN v VAN HEERDEN** 1977 (3) SA 455 W and **FIAT SA (PTY) LTD v BILL TROSKIE MOTORS** 1985 (1) SA 355 O.

At the hearing Mr Zietsman tendered a draft order in terms different from the prayer proposed in the notice of amendment which attracted criticism from the plaintiff's counsel, Mr van Rooyen. In view of the order I propose to make it not necessary to deal with this apparent defect in the exception.

[12] Finally I note that the notice of exception was not signed by counsel or by an attorney purporting to act in terms of section 4 sub-section (2) of The Right of Appearance in Courts Act, 1995 which is required of the party not suing or defending personally. Rule 18(1) of the Uniform Rules of Court provides as follows:

“A combined summons and every other pleading except a summons shall be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of The Right of Appearance in Courts Act 1995 (Act nr: 62 of 1995) has the right of appearance in the Supreme Court, only by such attorney or, if a party sues or defends personally, by that party.”

An exception is such a pleading. See HAARHOFF v WAKEFIELD 1955 (2) SA 425 E.

[13] In the result I make the following order:

- i) The exception is dismissed.
- ii) The defendant is ordered to pay the plaintiff's costs.

S. EBRAHIM, J

On behalf of Plaintiff:

Advocate P.C.F. van Rooyen
Instructed by
Naudes
BLOEMFONTEIN

On behalf of Defendant:

Advocate P Zietsman
Instructed by
Hill, McHardy & Herbst
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