

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A214/2023

Case No: A Quo: 3711/2022

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

(3) REVISED.

DATE: 13/05/2024

SIGNATURE

In the matter between:

ARISTOCRAFT (PTY) LTD

Appellant

And

PAINTCHEM (PTY) LTD

Respondent

JUDGMENT

[1] This is an appeal against the whole judgement and order of Magistrate SS Sambo, delivered on 26 October 2022, and later varied and corrected on 8 May 2023, dismissing the defendant's exceptions with costs on an attorney and client scale. The appeal is also against the findings of fact and the rules of law.

[2] For purposes of this judgement, and in order to avoid confusion, I will refer to the parties as they were in the magistrate's court. I will refer to the appellant as

the defendant and to the respondent as the plaintiff.

[3] Further, the facts giving rise to the appeal are stated below. I restate the particulars of claim in full for the purposes of giving a full background. This is so in that, to consider the complaint against the plaintiff, the allegations in the particulars of claim must be read as a whole and in context¹.

FACTUAL BACKGROUND

[4] During February 2022, the plaintiff instituted action against the defendant for, *inter alia*, payment in the sum of R1 037 180-78, interest on the said amount, and costs of suit.

[5] In terms of the particulars of claim, on 5 April 2018 and at Pretoria, the defendant and the plaintiff completed what is referred to as a written application for credit facilities, incorporating an agreement of sale for goods to be sold on credit by the plaintiff to the defendant. At the time, the plaintiff was represented by Pravesh Sing and/or a duly authorised representative of the plaintiff, while the defendant was represented by Faizel Motani. It is alleged that:

5.1 The defendant acknowledged that the credit facilities granted by the plaintiff were payable within 30 days of the date of the plaintiff's invoice.

5.2. All costs in any legal action against the defendant. shall include costs on attorney and client scale, tracing charges and attorney's collection commission, which will be payable by the defendant.

5.3. Should the defendant default in effecting payment on due

¹ *Naidoo and Another v The Dube Tradeport Corporation and Others* (Case number 972/2020) [2022] ZASCA 14 (27 January 2022), at para14 of 5th

date, of any amount, then the full balance outstanding becomes immediately and payable.

- 5.4. The plaintiff shall be entitled, in its discretion, to institute proceedings in the magistrates' court having jurisdiction, notwithstanding the fact that the amount in dispute may exceed the jurisdiction of the Magistrate's Court.
- 5.5. A certificate signed by a director or manager of the plaintiff reflecting the particulars of the amounts owing by the defendant shall be *prima facie* proof of the defendant's indebtedness to the plaintiff.
- 5.6. As per the terms of the agreement, the plaintiff sold and delivered the goods to the defendant, forwarded the invoices and statements to the defendant, and complied with its obligations in terms of the agreement.
- 5.7. In breach of the agreement, the defendant failed to effect payment, leaving a balance outstanding in the sum of R1,037,180.78.
- 5.8. The plaintiff concluded the particulars of claim by annexing copies of the customer ledger.

[6] The defendant filed its notice to defend and on 13 April 2022, filed its notice of exception on the basis that the plaintiff's particulars of claim lack averments necessary to sustain an action and/or are vague and embarrassing. In opposing the exception, one of the grounds of opposition was that the defendant can claim no prejudice to pleading to the particulars of claim as they stood.

[7] The notice of exception contains the following:

First ground of exception

- 7.1. In paragraph 4.1 of the plaintiff's particulars of claim the plaintiff alleges that in concluding the agreement, it was duly represented by Pravesh Singh and/or duly authorised representative of the plaintiff.
- 7.2. If the plaintiff relies upon a contract, it is bound by the requirements of rule 6 (6) of the magistrates' court rules of court and is obliged, to give the information required in precise terms.
- 7.3. The plaintiff has failed to allege with sufficient particularity by whom (on behalf of the plaintiff) the application for credit facilities incorporating the agreement of sale was concluded.
- 7.4. In the premises the allegation is embarrassing as it does not contain sufficient particularity to enable the defendant to plead thereto.

Second ground of exception

- 7.5. In paragraph 7 of the plaintiff's particulars of claim, the plaintiff alleges that this court has jurisdiction in respect of the matter in that 'the defendant's chosen *domicilium citandi* et *executandi* falls within the territorial jurisdiction of this court'.
- 7.6. The plaintiff has failed to plead the facts necessary to establish the jurisdiction of the magistrate's court to entertain this action. The plaintiff has not pleaded any facts in respect

of the jurisdiction of:

7.6.1. this court in respect of the course of action; and

7.6.2 the defendant.

7.7. In the premises the allegation regarding the court's jurisdiction is vague and embarrassing to enable the defendant to plead thereto.

Third ground of exception:

7.8. The plaintiffs claim as set out in paragraphs 3, 5 and 8 of the particulars of claim is founded on the basis that the plaintiff sold and delivered goods to the defendant in terms of the application for credit facilities incorporating the agreement of sale (***“the contract”***).

7.9. The plaintiff pleads in paragraph 9.2 of the particulars of claim that the defendant is indebted to the plaintiff and that the debt is due and payable. The plaintiff has failed to plead any facts which lay the basis for this allegation.

7.10. The plaintiff fails to comply with rule 6 (4) of the magistrates' court rules of court relating to pleadings generally in that the plaintiff has failed to set out a clear and concise statement of the material facts upon which the plaintiff relies on for its claim with sufficient particularity to enable the defendant to reply thereto. in that:

7.10.1. the plaintiff fails to set out with any particularity the validity of the contract concluded, the object sold,

the purchase price and/or under which circumstances the purchase price, or any portion thereof, has become due and payable.

7.10.2. The plaintiff fails to set out with particularity in what manner it had complied with its obligations in terms of the contract.

7.10.3. The plaintiff fails to set out with any particularity in what manner the defendant has breached its obligations in terms of the contract.

7.11. The plaintiff's particulars of claim lack the necessary averments to enable the defendant to reply thereto. The necessary averments cannot be implied.

7.12. In the circumstances, so the complaint goes, the particulars of claim do not disclose the plaintiff's cause of action against the defendant.

[8] The plaintiff filed its opposing affidavit, in terms of which it largely denied the allegations made by the defendant. It also contended that the defendant could claim no prejudice to pleading to the particulars of claim as they stood.

[9] The exception was subsequently argued, pursuant to which the Learned Additional Magistrate dismissed the exception and ordered the defendant to pay the costs on attorney and client scale.

THE LAW

The rules

[10] An exception, in terms of rule 19 of the magistrates' court rules, is a legal objection intended to complain about an inherent defect in a pleading. When adjudicating upon such an exception, the court takes a look at the pleading complained of as it stands. In other words, it looks at the pleading in its entirety, and not only at a particular paragraph. It is further important to note that a dismissal of an exception, save in respect of an exception dealing with the jurisdiction of the court, is not appealable. This is so in that such an exception does not finally dispose of the matter, which matter can still be argued at the trial on the same terms. In this appeal, the defendant raised the *The law on exceptions*.

[11] According to our caselaw, when a court is considering an exception on the ground that a pleading does not disclose a cause of action, the court must accept the factual allegations pleaded therein as true, unless they are clearly false and untenable.² It should have regard to the entire pleading and assess whether it does not disclose cause of action.

[12] The object of an exception is not to embarrass the opponent but to weed out pleadings that do not disclose any cause of action and thereby speedily resolve matters. According to Harms JA, as he then was, exceptions provide a useful mechanism to weed out cases without legal merit³

[13] In **Francis v Sharp**⁴, with reference to **Colonial Industries Ltd v Provincial Insurance**⁵, the regarding approach to an exception, which raise a substantive question of law that may have the effect of settling the dispute between the parties. namely. that an excipient should make out a very clear and strong case before he should be allowed to succeed. This approach has been consistently followed, especially in the CPD. The second aspect in that case is that the courts are reluctant to decide upon aspects of exception concerning

² Makgoka JA in *Naidoo and Another v The Dube Tradeport Corporation and Others* (case no 972/2020) (2022) ZASCA 14 (27 January 2022) at paras 18 and 35.

³ *Telematrix (Pty) Ltd v The Advertising Standards Authority SA* 2006 (1) SA 461 at paragraph 3.

⁴ *Francis v Sharp & Others* 2004 (3) SA 230

⁵ 1920 CPD 627 at 630

the interpretation of a contract. In this regard, it must be borne in mind that an excipient has the duty to persuade the court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed⁶. The 3rd aspect discussed in that case is that where a commercial document has been concluded to have commercial operation, it should not lightly be held to be ineffective. This should apply to oral agreements as well.

[14] In respect of a pleading that is vague and embarrassing, the approach is twofold: First, a court must determine whether indeed there is vagueness in the pleading. If so, whether such vagueness causes an embarrassment which is so serious that the opponent is prejudiced and is unable to plead to such a pleading. It is the excipient who must show that it is seriously prejudiced.⁷ In **Levitan**, Conradie J⁸ further stated that prejudice must ultimately lie in the inability to properly prepare to meet the opponent's case.

APPLICATION OF THE LEGAL PRINCIPLES

The notice of appeal

[15] Defendant attacks the judgement on 6 grounds, namely:

[16] That the magistrate erred in finding that defendant failed to indicate why it is prejudiced by Plaintiff's failure to set out with sufficient particularity the details of the individual by whom the contract was concluded.

[17] The magistrate erred in finding that defendant could easily ascertain from the written contract attached to plaintiff's particulars of claim as to who represented the parties in concluding the contract without having regard to the "established" practise in litigation that a plaintiff cannot expect a defendant to extract the particulars of the plaintiffs claim somewhere in the annexures.

⁶ *Theunessen v Trensvalse Lewendehawe Kooperasie Bpk* 1988 (2) SA 493 (A) at 500D

⁷ *Levitan v Newhaven Holiday Enterprises* CC 1991 (2) 297 CPD

⁸ *ibid*

[18] The magistrate erred in finding that the particulars of claim contain sufficient facts to establish jurisdiction without having due regard to the provisions of section 28 and/ or 29 of the Magistrates Court Act 32 of 1944.

[19] The magistrate erred in finding that the plaintiff's particulars of claim meet the requirements of rule 6(4) of the magistrates' rules, and more in particular that due to the fact that the parties agreed that the certificate of balance shall be *prima facie* proof of the amount of indebtedness, that as a result of the principle of *pacta sunt servanda*, all of the material facts of the contract of sale have been sufficiently and intelligibly pleaded, without having due regard to the *facta probanda* which must be pleaded by a party wishing to rely on a contract of sale as well as a seller claiming payment of the purchase price.

[20] The magistrate erred in finding that paragraph 9 of plaintiff's particulars of claim states how the breach arose, without having regard to plaintiff's failure to set out with sufficient particularity the validity of the contract, the object sold, the purchase price, under which circumstances, or any portion thereof became due and payable and/or the date of performance, and/or without having regard to the case law put forward by the defendant on the facts which must be pleaded, more in particular **Aldu Projects CC v Jiga International Development (Pty) Ltd** (943/2018) ZANWHC 25 (30 April 2020) at paras 16 to 19.

[21] Defendant concludes by contending that the magistrate erred in dismissing its exception with costs on attorney and client scale, including the costs consequent to the employment of counsel.

[22] In paragraph 17 of his judgement, the learned magistrate finds that, '... I am not persuaded that the paragraph of the particulars of claim complained of renders the pleading excipiable such that the excipient is unable to plead to the particulars of claim. The excipient has failed to indicate why the alleged

embarrassment, if any, is so serious that it is unable to plead and is therefore prejudiced, more especially when considering that a copy of the written contract was attached to the particulars of claim in compliance with rule 6(6) of the magistrates' courts rules and from which it can be easily ascertained as to who represented the respective parties when the contract was concluded.' In so doing, the magistrate relied on the SCA⁹.

First ground of appeal

[23] In paragraph 4.1 of the particulars of claim, the following is stated, 'In concluding the said application, the plaintiff was duly represented by Pravish Singh and/or a duly authorised representative of the plaintiff.' Defendant contends that the plaintiff relies upon a contract, as such it is bound by the requirements of rule 6(6) of the magistrates' court rules of court and is obliged to give the information required in precise terms.

[24] In this regard, the question is whether Defendant is seriously prejudiced by the particulars of claim. Rule 6 (6) of the magistrates' courts rules provides that, 'A party who in such party's pleading relies upon a contract shall state whether the contract is in writing or oral. when, where and by whom it was concluded. and if the contract is in writing a copy thereof or of the part relied on in the pleading shall be annexed to the pleading.'

[25] In casu, the plaintiff has, in paragraph 3 of its particulars of claim, stated that the contract is in writing, that it was concluded on 5 April 2018, and in Pretoria. In paragraph 4.1, plaintiff states that in concluding the contract, '... it was represented by its own representative being Pravesh Singh and/or a duly authorised representative of the plaintiff. In paragraph 4.2 it states that defendant was duly represented by Faizel Motani. Furthermore, a copy of the written agreement is attached as annexure "A" to the particulars of claim.

⁹ *Vermeulen v Valley Investments (Pty)Ltd* 2001 (3) SA 986 at 997 paragraph 7

[26] Defendant contends that this paragraph is contradictory and can be read in a number of ways. It further contends that it is not possible to ascertain from the particulars of claim which individual in fact represented the plaintiff. During argument, defendant's counsel contended that plaintiff does not identify the other individual, and as such, defendant will not be able to plead to that. Plaintiff's counsel, in response thereto, argued that the magistrate, relying on **Southern Port Developments (Pty) Ltd (previously known as Tsogo Sun Ebhayi (Pty) Ltd) v. Transnet**¹⁰, stated that, "In order for an exception to succeed, the excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it. A charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation. The court should not look at the pleading with a magnifying glass of too high-power. The pleadings must be read as a whole; no paragraph can be read in isolation. In order to succeed with an exception, the excipient needs to satisfy the court that it would be seriously prejudiced in the event that the exception should not be upheld."

[27] Relying on the above stated case, the magistrate reasoned that he is not persuaded that the paragraph of the particulars of claim complained of renders the pleading excipiable such that the excipient is unable to plead to the particulars of claim. Further, he found that the excipient has failed to indicate why the alleged embarrassment, if any, is so serious that it is unable to plead and is thus prejudiced.

[28] The impugned paragraph is not an exemplary way of drafting a pleading and may well be vague. It is possible that plaintiff was duly represented by Pravesh Singh, who was duly authorised to represent the plaintiff. It is also possible that the plaintiff was represented by an unnamed representative of the plaintiff. In my view, the vagueness arises when one looks at the second part of the paragraph introduced by the conjunctions. Indeed, the identity of the other

¹⁰ 2003 (5) SA 665 (W)

person, if any, introduced by the conjunctions is not disclosed.

[29] The next question to be asked is whether this vagueness and/or embarrassment is seriously prejudicial to the defendant. In my view, it appears that it is possible that the defendant can admit or deny that Pravesh Singh or an unnamed person represented the plaintiff at the conclusion of the agreement. Furthermore, it is possible that the defendant can deny that the plaintiff was also represented by any other authorised representative and put up its own version. Absent any serious prejudice, the exception should fail.

[30] Consequently, I agree with the Learned magistrate that the paragraph of the particulars of claim complained of does not render the pleading so excipiable such that the excipient is unable to plead to the particulars of claim.

[31] The question is whether there is any value in attaching a copy of the written contract to the particulars of claim. If there was no value at all, there would be no need to attach the said copy of a written contract. However, there is some value in attaching a copy of the written contract. That value is a supportive one. The attached written contract to the particulars of claim serves as the link to establishing a cause of action. In my view the magistrate was correct in referring to the copy of a written contract and for the purpose of assisting defendant to plead to the particulars of claim. 'A party clearly "relies upon a contract" when he uses it as a "link in the chain of his cause of action"'¹¹.

[32] Consequently, if one looks at this paragraph, it does not require an overly critical interpretation thereof to determine whether it complies with the provisions of rule 6(6) of the magistrates' court rules. Which is what defendant seems to suggest. I agree with the learned magistrate that there has been compliance with rule 6(6) of the magistrates' courts rules. Accordingly, the defendant's contention stands to be rejected.

¹¹ South African Railways and Harbours v Deal Enterprises (Pty) Ltd 1975 (3) SA 944(W) at 953A

Jurisdiction

[33] In paragraph 7 of the particulars of claim, Plaintiff states that the court has jurisdiction in that the Defendant's chosen *domicilium citandi et executandi* falls within the territorial jurisdiction of the magistrates' court.

[34] The defendant contends that the wording used by the plaintiff in the particulars of claim, does not accord with the provisions of section 28(1)(a) of the magistrates court Act, which provides that, '... the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other: any person who resides, carries on business or is employed within the district or regional division.' In her heads of argument, Counsel for the defendant argues that these words make it clear that it is intended to limit jurisdiction in respect of persons strictly to the categories of persons named in this section.

[35] If one looks at the particulars of claim, one finds that paragraph 2 thereof specifically states the address where defendant is based. The address is stated as follows: [...] E[...] Street, K[...] I[...] Pretoria. The same address is alleged to be the chosen *domicilium citandi* and appears on page 2 of annexure 'A' to the particulars of claim. The last page of the agreement, records that the agreement was signed at Pretoria. Both these addresses are situated within the jurisdiction of the Magistrates Court. These are the facts necessary to establish the jurisdiction of the Magistrates Court. Paragraph 7 of the particulars of claim simply confirms that that Magistrates Court has jurisdiction in respect of the matter between the parties. This is no contradiction to the provisions of section 28, and as such, the Magistrate cannot be faulted for his finding. In so far as the amount claimed is concerned, the parties consented in writing, through annexure A of the particulars of claim, to the jurisdiction of the magistrates' court.

Facta probanda and breach to be pleaded.

[36] In paragraphs 36 and 37 of his judgement. the learned magistrate stated that the third exception is directed at paragraphs 3, 5 and 8 of the particular of claim and stated that the excipient has a duty to persuade the court that upon every interpretation that the pleading is based, no cause of action or defence whatsoever is disclosed. Bearing in mind the legal principles applicable to exceptions, one cannot rely only on two paragraphs of the particulars of claim and conclude that the particulars of claim are excipiable. Even if there may be some criticism on how the particulars of claim are framed, I do not, however, think that the particulars of claim are so wanting in clarity that the excipient would have had difficulty in pleading the reto. As such, the excipient has not made out a strong case that on every inte rpretation of the particulars of claim, they are excipiable.

[37] Consequently, the appellant's contention stands t o be rejected. Accordingly, the appeal must fail costs.

ORDER

[38] The appeal is dismissed with costs.

K MOKOTEDI
ACTING JUDGE OF THE
HIGH COURT
GAUTENG DIVISION, PRETORIA

MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the appellant:

Adv N Diederichs

Instructed by: Y Ebrahim Attorneys

For the respondent: Adv XT Van Niekerk

Instructed by: CKMG Attorneys
c/o MJ Vermaak Inc.

THIS JUDGMENT WAS HANDED DOWN ELECTRONICALLY BY CIRCULATION TO THE PARTIES' AND OR PARTIES REPRESENTATIVES BY EMAIL AND BY BEING UPLOADED TO CASELINES. THE DATE FOR THE HAND DOWN IS DEEMED TO BE .13 MAY 2024.