



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
 (2) OF INTEREST TO OTHER JUDGES: NO
 (3) REVISED

DATE: 06 JUNE 2024

SIGNATURE: 

Case No: 030891/2022

In the matter between:

MIRAI RAIL CORPORATION (PTY) LTD

APPLICANT

And

H ROHLOFF (PTY) LTD

RESPONDENT

***Coram:* ACTING JUDGE KEKANA**

***Heard on:* 29 APRIL 2024**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system.

JUDGMENT

- [1] This is an application for exception taken by the plaintiff to the defendant's plea and counterclaim on the basis that the defendant's plea and counterclaim lack necessary averments to sustain a cause of action in at least six different instances. The plaintiff further submits that there is no reasonable construction of the pleading which could disclose a cause of action. Alternatively, the pleading is lacking in particularity such that it is vague and renders the plaintiff unable to plead thereto.
- [2] For better flow and ease of reading, I propose to restate the grounds as set out in the notice of exception here under. The plaintiff has raised six distinct grounds for its exception to the defendant's plea and counter claim. They could be summarised as follows:
- [2.1] the defendant fails to aver whether the agreement subsists or not as there would be different consequences if it still subsists than if it does no longer subsist. Whether the defendant is claiming for damages (compensatory damages) or cost of performance.
- [2.2] the defendant's averments are clearly insufficient to sustain any damages claim, or any other cause of action on the Transnet tender. In order to claim damages, the defendant would have needed to aver that by not succeeding in being awarded the tender, the plaintiff breached the

agreement. Without this averment, no “damages” suffered by the defendant as a result of the plaintiff’s not succeeding could give rise to any claim against the plaintiff because they did not arise from any breach by the plaintiff.

[2.3] the pleading falls far short of the requirements of rule 18(10) in that it has not specified whether the R 28 363 782.00 for three trucks is the defendant’s lost profits, revenue or amounts spent by the defendant in anticipation of the Transnet tender. The defendant vaguely describes the damages as a lost “stream of income” which would imply it is a claim for lost revenue. However, in order to claim lost revenue, the defendant would need to deduct the costs it would have had to incur in order to earn this revenue. It has not done so.

[2.4] defendant is trying to claim both for the costs of building the trucks, and for the revenue of selling them. This being a clear case of double dipping, the defendant has rendered its claim vague and embarrassing such that the plaintiff would be prejudiced in pleading thereto, as it comprises two mutually exclusive claims which are not in the alternative.

[2.5] The defendant’s second claim is for a declarator that the plaintiff has forfeited the monies already paid by it because, according to the defendant, the plaintiff was “*bound by its election*” made when it cancelled the agreement that it did so on “*full penalty of loss of any monies paid up until then*”, however the defendant does not plead that there is any such term in the agreement. A party cannot be bound by a

term which does not exist and is never pleaded, and this claim is, therefore, lacking necessary averments.

[2.6] The relief sought in terms of the defendant's second claim, which is in the alternative to the first claim, is for both a declarator and for a payment of R34 669 998.70. The second claim contains no averments, whatsoever, in support of the prayer for payment of R34 669 998.70.

[3] The defendant's contention of each ground raised by the plaintiff could be summarised as follows:

[3.1] On ground 1, the defendant is saying that the alleged confusion is not merited. The defendant states that "If the agreement was repudiated as alleged", the defendant is entitled to claim damages, which the defendant had done. The defendant goes further to say in not so many that the confusion if any will be dealt with by exchange of particulars for trial, pre-trial questions and discovery.

[3.2] On ground 2, the defendant states that the fact that the defendant, if it had tendered or the plaintiff, had supplied all the correct documentation, would have secured the tender, it is a factual question to be determined by the trial court. The plaintiff can plead and deny any causal link between the actions of the plaintiff and the decision of Transnet and then the relevant evidence at trial will determine whether the causal link was broken or not.

[3.3] As regards ground 3, the defendant states that the onus of proof of these damages lies with the defendant and will certainly set out its case in computing its damages leading up to trial.

[3.4] As for grounds 4, the defendant states any complaint thereto is not merited and should be left to the trial court.

[3.5] Ground 5 is based on a concession of repudiation and election by the plaintiff to forfeit all the monies paid. The defendant relies on the recent ***University of Johannesburg v Auckland Park Theological Seminar and Another***¹ case that when interpreting an agreement, all background facts pertaining to interpretation is admissible by a court and only thereafter the weight of the evidence is adjudicated.

[3.6] On ground 6, the defendant states that there is no misunderstanding of the relief sought. On proper reading it is for payment of the amount claimed, alternatively a declarator for forfeiture.

The law applicable to exceptions

Vague and embarrassing

[4] The rule dictate that:²

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

It is therefore strong that "minor blemishes in, and unradical embarrassments caused by, a pleading" could be cured by further particulars³.

¹ *University of Johannesburg v Auckland Park Theological Seminar and Another* 2021 (6) SA 1 CC.

² Rule 18(4) of the Uniform Rules of Court.

³ *Purdon v Muller* 1961(2) SA 211 (A) at 215F.

An exception to a pleading on the ground that it is vague, and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced⁴.

Exceptions and Applications to Strike Out

[5] The rule dictates that:⁵

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 paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.

Ground 1

[6] The defendant in its admission refers to the agreement being repudiated by the plaintiff but still it is not clear whether the agreement subsists or not. The defendant in its head of arguments at para 13 uses the word "if". The defendant expects the plaintiff when reading the plea holistically to can identify this averment. This averment needed to be clear and unambiguous in case the plaintiff disputes the alleged repudiation of the agreement or dispute how the repudiation was done, particularly as the agreement contains a clause

⁴ *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211-B.

⁵ Rule 32(1) of the Uniform Rules of Court.

describing the manner in which any changes to the agreement can be effected. Also, the defendant by his own admission states that the amount still had to be particularised.

- [7] It must be clear from the defendant's counterclaim whether it is suing for compensatory damages or cost of performance. The plea and counterclaim as currently formulated is not clear as dictated to by Rule 18(10) of the Uniform Rules of the Court. The defendant cannot rely on the pre-trial questions and discovery as a means to redress any vagueness in its counterclaim especially as the plaintiff is expected to plea thereto. The broad purpose of discovery is to narrow the issues in dispute not to bring new issues during the discovery. Ground 1 of the exception raised by the plaintiff is upheld.

Ground 2

- [8] The defendant makes an allegation of a causal link between the actions of the plaintiff and the decision of Transnet, but it does not put forward any averments which are necessary to show any cause of action. The defendant again leaves this issue to the trial court but conversely expects the plaintiff to plea thereto. This is again not in line with Rule 18(10) of the Uniform Rules of the Court.

Ground 3

- [9] The defendant states that it will certainly set out its case in computing its damages leading up to trial, this again cannot be something that is left for trial as the plaintiff must plead thereto. The [very purpose] of pleadings is to ascertain definitely what is the question at issue between the parties; and this

object can only be attained when each party states his case with precision⁶.

The defendant's reasoning does not ensure the furtherance of this purpose.

- [10] According to Harms (Harms Civil Procedure in the Supreme Court) at 264, the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of particularity of pleadings is required. The defendants' position that it will set out its case in computing its damages leading up to trial or that evidence will be adduced at the trial cannot stand the test of the Uniform Rules of the Court because clearly the plaintiff will, as stated in the case of *Trope*⁷ be prejudiced.

Ground 4

- [11] The defendant states any complaint thereto is not merited and should be left to the trial court. Again, the defendant refers to the trial court. It is important that the material facts that are relied on for the cause of action should be pleaded. The pleading should conclude with the relief sought. This should be done to assist the plaintiff to plea thereto. The repeated reference by the defendant of the trial court makes the whole exercise of pleadings futile. This is against the very purpose and object of pleadings as mentioned in para 9 above.

⁶ Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd ed

⁷ Supra *Trope* at 211-B.

Ground 5

- [12] The defendant relies on the recent *UJ* case (supra) that when interpreting an agreement, all background facts pertaining to interpretation is admissible by a court and only thereafter the weight of the evidence is adjudicated.
- [13] While reference is made to all background facts, the defendant still does not state nor refer to those facts to allow the plaintiff the opportunity to plea thereto. A dispute of fact may arise but that can only happen if the plaintiff is made aware of the facts referred to in case the plaintiff disputes those facts. In my view this is not a matter of vagueness or lack of particularity but rather nothing is averred by the defendant on the matter. Having the plaintiff to plead thereto will cause embarrassment within the context of Rule 32(1) of the Uniform Rules of the Court. The plaintiff will be prejudiced to plea thereto.

Ground 6

- [14] The defendants state that on proper reading it is for payment of the amount claimed, alternatively a declarator for forfeiture. While the plaintiff is of the view that the second claim contains no averments, whatsoever, in support of the prayer for payment of R34 669 998.70. Upon careful perusal of the defendant's plea and counterclaim, paras 39.1 and 39.2 are standalone prayers nowhere is the word "alternative" used. On the reading thereof the defendant is praying for both a declarator that the plaintiff forfeits the monies paid and must also pay the amount of 34 669 998. 70. It is against this background that even the prayers lack averments to support the amount claimed and particularity.

[15] The object of a pleading was also explained by the Court in *Dharumpal Transport (Pty) Ltd v Dharumpa*⁸ as follows:

“The object, of course, of all pleadings is that a succinct statement of grounds upon which a claim is made or resisted shall be set forth shortly and concisely; where a statement is vague, it is either meaningless, or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on, and therefore it is also something which is insufficient in law to support in whole or in part the action or defence. . . .”

[16] Further, as to pleadings which disclose no cause of action, Griessel J in *Frank v Premier Hangers CC*⁹ at para 11 stated that:

“In order to succeed in its exception, the Plaintiff has the onus to persuade the court that, upon every interpretation which the defendant’s plea and counterclaim can reasonably bear, no defence or cause of action is disclosed. Failing which, the exception ought not to be upheld”.

[17] The defendant’s plea and counterclaim lack necessary averments to sustain a cause of action and/or defence. It is vague and embarrassing that the plaintiff is prejudiced in pleading thereto. I’m persuaded to agree with the applicant/plaintiff on all six grounds raised in the exception.

[18] In the circumstances the following order is made:

1. That the exception is upheld with costs.
2. The Defendant/Respondent to pay cost on the scale as between attorney and client.

⁸ 1956 (1) SA 700 (A) at 705D.

⁹ 2008(3) SA 594 (C).

3. The Defendant/Respondent is granted leave to amend its plea and counterclaim within a period of 15 days from date hereof.

HEARD ON: 29 APRIL 2024

JUDGMENT DELIVERED ON: 06 JUNE 2024

COUNSEL FOR THE APPELLANT: ADV D WATSON

COUNSEL FOR RESPONDENT: ADV PJ GREYLING