

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 8467/2022

(1)	REPORTABLE: YES/NO	
(2)	OF INTEREST TO THE J	
(3)	REVISED.	
DATE: 24/04/2024		SIGNATURE:

In the matter between:

EMPACT GROUP

Plaintiff

And

MERENSKY HIGH SCHOOL

Defendant

JUDGEMENT

- [1] This matter is about the exception raised by the plaintiff in respect of the defendant's counterclaim.
- [2] The plaintiff gave the defendant the prescribed fifteen days to remove the cause of complaint. The basis of the complaint is that the plaintiff is prejudiced in that it is unable to plead to the defendant's counterclaim.
- [3] The purpose of the exception is to protect litigants against claims that are bad in law or against an embarrassment which is serious as to merit the costs even of an exception. It is useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.¹

While the exception is a useful mechanism to weed out cases without merits, it is nonetheless necessary that they be dealt with sensibly. It is where the pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernable and legally recognized cause of action, that an exception is competent.²

¹ Pretorius & Another v Transport Pension Fund & Another (2018) ZACC ; 2019(2) SA 37(CC); (2018) 7 BLLR 633(CC); 2018(7) BCLR 838(CC) – par 15 .

² Tembani & Others v President of RSA & Another (2022) ZASCA 70 (20/05/22) par 14

[4] The excipient has a duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action or defence is disclosed, failing which the exception ought not to be upheld.³

[5] In the main the plaintiff's cause of complaint is that the defendant's counterclaim is allegedly vague and embarrassing.

[6] An exception that a pleading is vague or embarrassing will not be allowed unless the excipient will be seriously prejudice if the offending allegations were not expunged. The effect of this is that the exception can be taken only if the vagueness relates to the cause of action.⁴

[7] An exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strike or goes to the root of the entire cause of action or defence, as the case may be. The exception should have the effect of putting the matter to rest.⁵

³ Picbel Group Voorsorgfonds (in Liquidation) v Somerville , and Related Matters (2013) ZASCA 24- par 7: 2013(5)SA 496(SCA) at 501A-B : Theunissen & Others v Transvaalse Lewendehawe Kooperasie (1987) ZASCA 93; (1998) 1 All SA 289(A); 1988(2) SA 493(A)

⁴ Erasmus : Superior Court Practice at Vol 2 D1-299.

⁵ Jowell v Bramwell- Jones & Others 1998(1) SA 836(W) at 905 H-I.; Giant Leap Workspace Specialists(Pty) v Scion Trading (Pty) Ltd T/A The SA Gold Exchange (2014/3764) (2016) ZAGPJHC 321(23 Nov 2016)

- [8] The plea that a pleading is vague and embarrassing must be directed to the pleadings read as whole and at a particular paragraph.
- [9] The question is 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/she objects.⁶
- [10] Paragraphs 38 to 41 of the defendant's counterclaim relate to counterclaim one. In respect of this counterclaim, the complaint is that it fails to disclose which terms of the agreement the plaintiff has allegedly failed to comply with. A further complaint is that while the defendant lists numbers that were allegedly paid but were not due/erroneously paid to the plaintiff, the counterclaim provides no calculation, reconciliation, bank statement, invoice, order confirmation or any facts which can be referred to, to determine whether the numbers are accurate, or to allow the plaintiff to plead thereto.
- [11] I understand the defendant's heads of arguments to be that in breach of the terms of the agreement the plaintiff claimed and received the stated amount of money of R2 784 143.33. Paragraph 40 makes it clear that in the alternative the plaintiff has been unduly enriched. The other complaints relate to evidence which need not be pleaded. I don't think the plaintiff is prejudiced to respond as to whether it received the money the defendant alleges is not due to the plaintiff. To raise that it is confusing whether the cause of action is the breach of contract or undue enrichment is technical.

⁶ Ramanna & Associates CC v Ekurhuleni Development Company(Pty)Ltd (2014) ZAGPJHC 73 at par 14

[12] With regard to paragraph 41 of the counterclaim, the cause of complaint is that the defendant relies on two distinct set of facts. I see no vague and embarrassing, therefore no prejudice in the defendant stating that the demand for payment was already made, in the alternative and in the event of the finding that there was no previous demand, the pleading constitutes the demand.

[13] With regard to paragraphs 43 to 48 of the counterclaim, the cause of complaint is that the defendant relies on the third distinct cause of action that the plaintiff committed breach of contract by overcharging the defendant. The allegation is that this is vague and embarrassing.

In paragraph 43 to 48 the defendant pleads alternative claim two to claim one. This alternative claim is in the event of the finding that the plaintiff was entitled to charge, in addition, to the fixed fee for the meals provided during government marking periods. The defendant pleads that the plaintiff did not comply with its contractual obligations in that it impermissibly overcharged, applying a higher rate than that applicable per meal.

This is permissible further alternative which produce no prejudice for the plaintiff to deal it.

[14] The third cause of complain starts from paragraph 49 of the defendant's counterclaim. The cause of complaint is that the defendant again seeks to plead alternative facts. The defendant's heads of argument states that this deals with the application of an incorrect escalation and/or a failure to apply the agreed escalation as provided for in

terms of the Fixed Fee/ Management Fee as provided for in terms of clause 3 of appendix 4A of the agreement.

The introduction of alleged overcharging as an alternative cause of action should not be prejudicial to the plaintiff's conduct of its case.

[15] At issue is the formulation of the cause of action, not its validity.⁷ How parties formulate claims differ but that should not lead to the other party seeing that as being exceipiable. The parties should take the other's claims as formulated and in the case of exception, the facts must be accepted as pleaded. The exception must be determined on the pleadings as they stand, assuming the facts stated therein to be true.

[16] It is legally permissible to formulate claims in the alternative, even if the alternative claims are different causes of action.

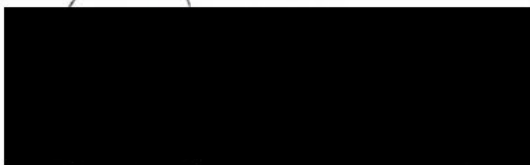
[17] On the balance of probabilities, the applicant has not proved that the defendant's counterclaim is vague and embarrassing and that that strike or goes to the root of the entire cause of action/ claim or defence, as the case may be. It has not proved that the alleged embarrassment is so serious as to cause prejudice that it is unable to plead to the counterclaim. The applicant's application fails.

[18] There is no basis to deviated from the position that the cost follows the result.

⁷ Trope v SA Reserve Bank 1993(3) SA 164(A) at 2691

Order

- [a] On the balance of probabilities, the plaintiff has failed to prove that the defendant's counterclaim is vague and embarrassing and it is prejudice to plea to the counterclaim
- (b) The plaintiff's application is dismissed with costs.



LEDWABA AJ

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES

For the plaintiff : Adv JP Morton

Instructed by: MacGregor Attorneys

C/O Rheeder Attorneys

56A Hoog Street

Polokwane

For the first defendant : RJ Groenewald

Instructed by: Joubert & May Attorneys

C/O De Bruin Oberholzer

Polokwane

Heard on: 19th February 2024

Judgement delivered electronically on: 24th April 2024

POLOKWANE HIGH COURT