



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 43442/2020

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
9/10/2024	
DATE	SIGNATURE

In the matter between:

KOGL JURGEN

Applicant/Defendant

and

RONEL CROOKS N.O.

Respondent/Plaintiff

JUDGMENT

MANAMELA, AJ

Introduction

[1] In this matter the Applicant raises an exception in terms of Rule 23(1)¹ of the Uniform Rules of Court against the Respondent's Particulars of Claim. The application is opposed.

¹ Rule 23(1) provides as follows:

"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

[2] The Applicant is the Defendant in the main action and the Respondent is the Plaintiff. I will refer to the parties herein below as in the main action.

[3] The Plaintiff, Mrs Ronel Crooks N.O., acting in her representative capacity as the executrix in the estate of her late husband, Mr Wayne Haydn Crooks, instituted action against Mr. Jurgen Kogl, for payment of an amount of £530,000.00 and interest at 7% calculated from date of demand, to date of final payment. Alternatively, a claim for unjust enrichment to the value of £530,000.00 or a fair market value of some private art collection which were left in the Defendant's possession.

[4] The exception is raised on the basis that the Plaintiff's Particulars of Claim fail to disclose a cause of action. The first notice of exception was served on 25 June 2021, in which three grounds of exception were raised; the second exception was delivered on 19 October 2021 under which the Defendant only proceeded with two of the grounds.

[5] On 20 August 2021, the Plaintiff filed a notice to amend the Particulars of Claim and to which no objection was raised, and on 16 September 2021 the amended Particulars of Claim was served.

Factual background

[6] The Plaintiff instituted proceedings against the Defendant in this matter based on the conclusion of a sale agreement, which is allegedly written, alternatively partly written and partly oral, in terms of which Mr Crooks sold some private art collection items to the Defendant. The Plaintiff alleges that despite numerous reminders and demands, the Defendant failed to pay the purchase price for those items, and that led to this legal action.

[7] The relevant parts of the Particulars of Claim are that:

“16. On 27 April 2018, at (Johannesburg being the Defendants place of residence), Mr. Crooks and the Defendant concluded a written, alternatively partly written and partly oral, agreement in terms of which Mr. Crooks would sell certain items from his collections of artefacts, carpets,

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.”

books and vinyl records to the Defendant, and the Defendant would purchase said items. A copy of the written agreement (compromising of emails exchanged between the parties) is hereto attached and marked annexure “**POC1**”.

17. The material express, alternatively implied, further alternatively tacit, terms of the agreement were:
 - 17.1. Mr Crooks offered the catalogue of items which is reflected in the document and photos attached hereto as annexure “**POC2**”.
 - 17.2. Mr. Crooks set the selling price for the above items at £530,000.00 (five hundred and thirty pounds), which selling price was comprised the following amounts:
 - 17.2.1. African art collection: £460,000.00
 - 17.2.2. Oriental/Asian art collection: £40,000.00
 - 17.2.3. Vinyl records: £30,000.00
 - 17.2.4. Mr Crooks decided to offer his carpet and book collection to the Defendant at no cost.
 - 17.3. The Defendant tendered his acceptance of the offer of sale of the above items, and, following negotiations, agreed to retain possession of the above items against payment of the selling price to Mr Crooks.”

Grounds of exception

[8] The Defendant’s grounds for exception were that the Plaintiff’s Particulars of Claim lacks averments which are necessary to sustain a cause of action on the following grounds:

- a. as to the alleged tacit terms, no allegations are made as to the unequivocal conduct of the parties that they intended to, and did in fact, contract on the terms alleged, and the claim is accordingly bad in law (“first ground of complaint”);
- b. it does not contain a clear and concise statement of facts as to how the Applicant tendered his acceptance of the offer, and the claim is accordingly bad in law (“second ground of complaint”);
- c. the Respondent specifically pleads that the “carpet and book collection” was donated to the Applicant but notwithstanding, continues to claim full

payment in the amount of £530,000.00 from the Applicant and is accordingly bad in law ("third ground of complaint").

[9] The Defendant decided not to proceed with the last ground of complaint.

Applicable legislation and rules

[10] Section 173 of the Constitution of the Republic of South Africa, 1996, grants every superior court the inherent power to protect and regulate its own process, taking into account the interests of justice. This includes the power to dismiss claims or defences that are vexatious, frivolous, or an abuse of the court process.

[11] Rule 23(1) of the Uniform Rules of Court allows a party to except to a pleading on the basis that it lacks averments necessary to sustain a cause of action or defence or is vague and embarrassing. An exception must clearly set out the grounds upon which it is based and be served within the time periods stipulated by the Rules. The purpose of an exception is to dispose of the case (or parts of it) without the need for trial when it is evident from the pleadings that no cause of action or defence exists.

[12] Rule 23(1) is usually read together with Rule 18(4), which is the general rule relating to pleadings, which states that–

“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”.

[13] This rule emphasises the need for clarity and specificity in pleadings to ensure that the opposing party is not prejudiced by ambiguity or uncertainty in the claims made against them.

[14] Rule 18(6) requires that a party relying upon a contract must state whether the contract is written or oral, and when, where, and by whom it was concluded. If the contract is written, a true copy thereof or the part relied upon shall be annexed to the pleading. If the contract is oral, the terms thereof must be fully stated.

[15] In *McKenzie v Farmers' Co-operative Meat Industries Ltd*,² the court emphasised that every pleading should contain a clear and concise statement of the material facts upon which the pleader relies for their claim, with sufficient particularity to enable the opposite party to reply thereto.

[16] The excipient has the duty to persuade the Court that, upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed. In *Trustees, Bus Industry Restructuring Fund v Break Through Investments CC and Others*³ the court stated that “[i]f an alternative interpretation is available, the court will not accept a meaning which would lead to absurd practical and commercial consequences”.

[17] In *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*,⁴ Wallis JA remarked that—

“[t]he test on exception is whether on all possible readings of the facts no cause of action is made out. It is for the Defendant to satisfy the court that the conclusion of law for which the Plaintiff contends cannot be supported upon every interpretation that can be put upon the facts.”

Analysis

[18] It is trite that an exception is a legal objection to the opponent's pleading.

[19] Exceptions were explained in the matter of *Colonial Industries Ltd v Provincial Insurance Co Ltd*⁵ as follows:

“[T]he form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed: its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings: it also serves as a means of

² 1922 AD 16 at 23.

³ 2008 (1) SA 67 (SCA) at 73E-F.

⁴ 2013 (2) SA 213 (SCA) at para 36.

⁵ 1920 CPD 627 at 630.

taking objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing.”

[20] An exception provides a useful mechanism for weeding out cases without legal merit. Be that as it may, an exception should still be dealt with in a sensible and not over-technical manner.⁶

[21] The test for exception is whether on all possible readings of the facts no cause of action is made out.⁷ The test for exceptions was formulated in *Southernport Developments (Pty) Ltd v Transnet Ltd*,⁸ that–

- “1. In order for exception to succeed, the excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it.⁹
2. A charitable test is used on exception, especially in deciding whether a case of action is established, and the pleader is entitled to a benevolent interpretation.¹⁰
3. The Court should not look at a pleading ‘with magnifying glass of too high power’.¹¹
4. The pleadings must be read as a whole; no paragraph can be read in isolation.”

[22] The Defendant’s first ground of exception is that the Plaintiff has not alleged unequivocal conduct that establishes on a balance of probabilities that the parties intended to, and did in fact, contract on the terms alleged. The Defendant further argues that the Plaintiff specifically pleads that the purported agreement comprises of tacit terms.

⁶ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at 465G-H.

⁷ *Astral Operations Ltd v Nambitha Distributors (Pty) Ltd; Astral Operations Ltd v O’Farrell* [2013] 4 All SA 598 (KZD) at para 6.

⁸ 2003 (5) SA 665 (W) at 669.

⁹ See also *First National Bank Southern Africa v Perry NO and Others* 2001 (3) SA (SCA) (*Perry*) at 965D; *Theunissen en Andere v Transvaalse Lewendehawe Koop BPK* 1988 (2) SA 493 (A) at 500 E-F.

¹⁰ See also *Perry* above at 9721-J.

¹¹ See also *Kahn v Stuart and Others* 1942 CPD 386 at 391; *Purdon v Muller* 1961 (2) SA 211 (A) at 214E-215F.

[23] Under the second ground of exception the Defendant argues that an unacceptable offer cannot create a contract. The Defendant contends that if reliance is placed on the tacit acceptance of the offer, such tacit acceptance must be alleged, including allegations of the basic facts on which the party relies upon in order to substantiate acceptance. The Defendant further argues that the Plaintiff did not plead how the acceptance was conveyed.

[24] It is trite that if evidence can be led which can disclose a cause of action or defence alleged in a pleading, that particular pleading is not excipiable. The term “cause of action” was defined in *McKenzie v Farmers’ Co-operative Meat Industries Ltd*¹² as–

“every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

[25] Care must be taken in any given case to distinguish the facts which must be proved in order to disclose a cause of action (the *facta probanda*) from the facts which prove them (the *facta probantia*).¹³

[26] Pleading must be read as a whole no paragraph can be read in isolation. To succeed with an exception, the excipient needs to satisfy the court that it would be seriously prejudiced in the event that the exception is not upheld. An exception can succeed only if the facts pleaded by a plaintiff could not, on any basis, as a matter of law, result in a judgment against the cited defendant.

[27] The question therefore to be answered is whether the Excipient has concisely stated the grounds upon which the exception is founded. In this regard, the court is required to evaluate, whether upon reading of the pleadings in its entirety the claim has been formulated in a manner that allows the Defendant to ascertain clearly what the case against it is and whether the Defendant is able to plead to it.

¹² Above n 2 at 23.

¹³ Van Loggerenberg *Erasmus Superior Court Practice* Service 45, 2014 at B1-156.

[28] In *Number Two Piggeries (Pty) Ltd v City of Tshwane Metropolitan Municipality* *In re: City of Tshwane Metropolitan Municipality v Number Two Piggeries (Pty) Ltd*¹⁴, the court formulated some guidelines on the approach to be taken by the court, that ‘if the exception is based on an absence of a cause of action the court should deal with the exception sensibly and not in an over-technical manner. Although one should not be overly technical and read the pleading as a whole the claim should be formulated in a way that allows the defendant to ascertain clearly what the case against it is and should enable the defendant to plead to it.’

[29] I find that the Plaintiff has set out a pleadable case in that the Plaintiff has set out a date on which the parties entered into an agreement of sale. The Plaintiff went on to allege that the agreement is partly written and partly oral and had annexed a copy of the written portion of the agreement.

[30] To the extent that the Defendant argues that the Plaintiff relied on a ‘tacit contract’, when stating that it is necessary to allege and prove unequivocal conduct that establishes on a balance of probabilities that the parties intended to, and did in fact, contract on the terms alleged, I find that the Defendant is applying a negative interpretation of the pleading, instead of a benevolent one.

[31] In *Bremer Meulens (Edms) Bpk v Floros*,¹⁵ the court explained the nature of a tacit contract as:

“[I]n so far as the essentials are concerned there is no difference between express and tacit agreements. Indeed the only difference lies in the method of proof, the former being proved either by evidence of the verbal declarations of the parties or the production of the written instrument embodying their agreement, the latter by inference from the conduct of the parties”.

¹⁴ (2081/2021) [2022] ZAGPPHC 274

¹⁵ 1966 1 PH A36 (AD) at 129-130.

[32] A further illustration of tacit contracts was made in *Roelof Laufs (Pty) Ltd and Others v Absa Bank Limited*¹⁶ where the court described a tacit contract as the entire contract being implied from the facts and circumstances. The court made the observation that where reliance is placed on a tacit contract (a contract implied from the facts and circumstances), a statement of the facts and circumstances constituting the implied contract relied upon are required. The facts and circumstances from which the implied contract is relied upon must be set out in the Particulars of Claim. Generally, any reference to a tacit contract would be raised in the alternative when pleaded.

[33] The Plaintiff argues that she did not allege that she was relying on a tacit contract or term. I also find it evident that the Plaintiff makes no reference to a tacit contract or term in the Particulars of Claim and therefore this argument shall not stand.

[34] I agree with the Plaintiff's counsel that the Defendant's grounds of exception are totally misguided and that, *facta probantia* are a matter of evidence to be raised at trial and thus cannot form part of pleadings. Further that the damages are calculable, that is, they are clearly set out in a manner which enables the Defendant to reasonably assess the quantum thereof in terms of Rule 18(10).

[35] I find that the Plaintiff has set-out the facts that are necessary to be proven and those facts are clearly answerable.

Conclusion

[36] Considering the legal principles relating to exceptions, the pleadings exchanged between the parties, particularly the amended Particulars of Claim by the Plaintiff, it is clear that the grounds on which the exception is founded must be stated clearly and concisely. The grounds provided does not seem to get to the root of the claim. I am of the view that the Defendant has failed to demonstrate on a balance of probabilities that the Plaintiff's Particulars of Claim lack sufficient degree of precision to demonstrate the facts upon which the case is based.

¹⁶ [2017] ZAGPPHC 715 at paras 25-26.

[37] The Defendant failed to prove that he does not know the case and that the pleading is *ex facie* lacking averments necessary to sustain a cause of action in every alternative permutation pleaded by the Plaintiff.

Order

[38] I accordingly grant the following order:

1. The Defendant's exception is dismissed with costs.

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PN MANAMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

For the Applicant/Defendant:

R. Adams instructed by Pottas Inc
Attorneys

For the Respondent/Plaintiff:

X. Khoza instructed by Adams and
Adams Attorneys

Date of hearing: 10 September 2024

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and by uploading to the CaseLines electronic platform.

The date for hand-down is deemed to be 09 October 2024.