

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	<u>NOT</u> REPORTABLE
(2)	<u>NOT</u> OF INTEREST TO OTHER JUDGES

CASE NO: A2024-001715

DATE: 28 OCTOBER 2024

In the matter between:

SUN CITY WATERWORLD (PTY) LIMITED

Appellant

and

SUN INTERNATIONAL (SOUTH AFRICA) LIMITED

Respondent

Coram: Adams J, Senyatsi J et Young AJ

Heard: 23 October 2024

Delivered: 28 October 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 28 October 2024.

Summary: Civil procedure – exception to plaintiff's replication to defendant's plea on the basis that it is vague and embarrassing – plaintiff claims declaratory and interdictory relief to secure occupation of commercial leased premises – claim based on old oral agreement – in replication, plaintiff admits more recent written agreement, but alleges that oral agreement survived these written agreements on their expiration – defendant contends that plaintiff prefers and

formulates new cause of action in replication – therefore, replication vague and embarrassing and excipiable – thorough and proper consideration of the pleadings reveals that plaintiff's cause of action based throughout on old oral agreement – excipient did not demonstrate that the pleading is ambiguous, meaningless, contradictory or capable of more than one meaning, to the extent that it amounts to vagueness, which vagueness causes embarrassment to the excipient –

Exception should not have been upheld by the court *a quo* – appeal succeeds.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (Mudau J sitting as Court of first instance):

- (1) The appellant's appeal against the order of the court *a quo* succeeds and is upheld, with costs.
- (2) The order of the court *a quo* is set aside and in its place is substituted the following: -
'The defendant's exception to the plaintiff's replication to the defendant's plea fails and is dismissed, with costs.'

JUDGMENT

Adams J and Young AJ (Senyatsi J concurring):

[1]. This appeal arises from an exception, which was considered and upheld by the Gauteng Division of the High Court, Johannesburg (court *a quo* or High Court). The respondent¹ excepted to the replication of the appellant² to the respondent's plea on the basis that it is vague and embarrassing. The appeal is with the leave of the Supreme Court of Appeal, the High Court having refused the appellant's application for leave to appeal.

[2]. It is convenient to refer to the appellant as 'the plaintiff' and the respondent as 'the defendant', as in the main action in the High Court. We shall henceforth do so.

[3]. In the action the plaintiff claims declaratory and interdictory relief and prays for orders as follows: -

¹ Defendant in the main action in the High Court.

² Plaintiff in the main action in the High Court.

- '(1) Declaring that the agreement referred to in 16 above is a binding agreement between the plaintiff and the defendant.
- (2) Declaring that the plaintiff is entitled to occupation of the lake and the facilities in perpetuity pursuant to the agreement.
- (3) Interdicting and restraining the defendant from evicting the plaintiff from the lake and the facilities or disturbing or interfering with the plaintiff's occupation of the said lake or facilities in any manner.
- (4) Interdicting and restraining the defendant from preventing the plaintiff and its employees from having unrestricted access to the lake and the facilities.
- (5) Ordering the defendant to permit the plaintiff to conduct the business of the water sports and the facilities without any hindrance, obstruction or disturbance.
- (6) Costs of suit.
- (7) Other or alternative relief.'

[4]. The reference to 'the agreement referred to in 16' in prayer (1) above – para 16 of the particulars of claim – is a reference to an oral agreement which forms the basis of the plaintiff's cause of action as per its particulars of claim. The plaintiff pleads the details and the particulars of that agreement as follows: -

'The Agreement

- 11 During or about 1981 [the defendant] required the lake to be operated as a recreational facility for the benefit of its guests and visitors.
- 12 The plaintiff was willing to provide such services.
- 13 During or about 1981 at Sandton the plaintiff and the defendant entered into an oral agreement (the agreement).
- 14
- 16 The material express alternatively implied or tacit terms of the agreement were as follows:
 - 16.1 The plaintiff was entitled to occupy and control the lake and its surrounding area for the purpose of conducting water sports and offering recreational services.
 - 16.2 Such occupation would be in perpetuity free of any rental or other remuneration for so long as the plaintiff provided such water sports and recreational services to the guests and visitors at Sun City.
- 17 The said water sports and recreational services which formed the basis of the agreement are referred to herein for the sake of convenience as "the water sports".
- 18 Pursuant to the agreement the plaintiff duly took occupation and control of the lake and conducted the water sports.
- 19 The plaintiff has so conducted the water sports from the inception of the agreement to date, i e for the period of about 37 years, with the full knowledge and consent of the defendant and the plaintiff continues to do so.'

[5]. From the foregoing it is clear that the plaintiff's claim, as per its particulars of claim, is based on the agreement which was concluded during 1981. In that regard, the particulars of claim plead in conclusion in relation to the contractual relationship between the plaintiff and the defendant as follows: -

'27 By virtue of the conduct of the plaintiff and the defendant as set out above in regard to their dealings with each other in relation to the water sports and the facilities, the plaintiff and the defendant have entered into an agreement by conduct in respect of each of the facilities to the effect that each such facility was associated with the water sports conducted by the plaintiff at the commencement of the agreement and that the provisions of the agreement set out in (16) above would apply to the facilities save that the plaintiff would be obliged to make payment to the defendant of an agreed rental in respect of the occupation of the facilities and failing such agreement a reasonable rental.'

[6]. The defendant resists the plaintiff's claim for the declaratory and the interdictory relief on the basis that, effective 1 July 2018, the plaintiff 'has no legal entitlement to be in occupation of the first and second premises'. In that regard, the defendant pleads that in terms of and pursuant to two written agreements of lease, both dated 15 May 2015, the defendant leased to the plaintiff 'premises' (as defined) for a period of three years from 1 July 2015 to 30 June 2018. Both these agreements, so it is averred by the defendant, terminated on 30 June 2018 by effluxion of time. The defendant has also preferred a counterclaim for the eviction of the defendant from the premises on the basis of these averments.

[7]. It may be apposite to cite the relevant passages from the defendant's plea, which, in the relevant part, reads as follows: -

'5.2 On 15 May 2015 and at the Sun City Resort, North West Province, [the plaintiff and the defendant] concluded a written lease agreement, a copy of which is attached hereto as "P1" (referred to as "the first lease agreement" hereafter).

5.3 The material written terms of the first lease agreement were as follows:

- 5.3.1 The defendant would lease the premises to the plaintiff;
- 5.3.2 the premises leased included the Cabanas reception area measuring 27 square meters ("the first premises");
- 5.3.3 the lease agreement was for a duration of three years;
- 5.3.4 the commencement date was 1 July 2015;
- 5.3.5 the termination date was 30 June 2018;

- 5.3.6 the defendant, as lessor, had an option to renew the lease for a period of two years; and
- 5.3.7 the rental payable for the period of from 1 July 2015 to 30 June 2018 was 10% of the turnover made by the plaintiff on the first premises.
- 5.4 The first lease agreement terminated on 30 June 2018 by the effluxion of time.
- 5.5 The defendant as lessor did not exercise its option to renew in respect of the first lease agreement.
- 5.6 There is currently no lease agreement between the plaintiff and the defendant in respect of the first premises.

The second lease agreement

- 5.7 On 18 May 2015 and at the Sun City Resort, North West Province, [the plaintiff and the defendant] concluded a written lease agreement, a copy of which is attached hereto as "P2" (referred to as "the second lease agreement" hereafter).
- 5.8 The material written terms of the second lease agreement were as follows:
 - 5.8.1 The premises leased included the entire lake, incorporating.
 - 5.8.1.1 all water sports facilities,
 - 5.8.1.2 The Beach Shop,
 - 5.8.1.3 Finders Keepers and yard area, 10
 - 5.8.1.4 Treasure Island Snack Bar,
 - 5.8.1.5 Treasure Island,
 - 5.8.1.6 Mini Car Adventure Trial,
 - 5.8.1.7 Mini Train Station
 ("the second premises"),
 - 5.8.2 the defendant would lease the second premises to the plaintiff to provide guests and day visitors with facilities and services in respect of the second premises;
 - 5.8.3 the lease agreement was for a duration of three years;
 - 5.8.4 the commencement date was 1 July 2015;
 - 5.8.5 the termination date was 30 June 2018;
 - 5.8.6 the defendant, as lessor, had an option to renew the lease for a further period of two years;
 - 5.8.7 the rental payable for the period of 1 June 2015 to 31 December 2015 was:
 - 5.8.7.1 5% of the turnover on water sports,
 - 5.8.7.2 10% of the turnover made on other areas,
 - 5.8.8 the rental payable for the period of 1 January 2016 to 30 June 2018 was:
 - 5.8.8.1 8% of the turnover made on water sports, and
 - 5.8.8.2 10% of the turnover made on all other areas.
- 5.9 The second lease agreement terminated on 30 June 2018 by the effluxion of time.

- 5.10 The defendant as lessor did not exercise its option to renew in respect of the second lease agreement.
- 5.11 There is currently no lease agreement between the plaintiff and the defendant respect of the second premises.
- 5.12 Any alleged oral lease agreement between the plaintiff and the defendant was superseded by the two written lease agreements (the first lease agreement and the second lease agreement) concluded between the plaintiff and the defendant and is invalid and of no force or effect.
- 5.13 The plaintiff therefore has no legal entitlement to be in occupation of the first and second premises.'

[8]. On 27 August 2018, the plaintiff delivered its replication to the defendant's plea and its plea to the counterclaim and, in the process, changed tact. In its replication, the plaintiff admits the agreements, which it refers to as 'the parallel agreements', but claims rectification of the said agreements on the basis that the common intention of the parties was that the so-called parallel agreements did not detract from the agreement referred to in the plaintiff's particulars of claim and ran parallel to the said agreement for the periods set out in the parallel agreements. The change in tact was constituted by the fact that the plaintiff, which relied in its particulars of claim on the 1981 oral agreement, which in fact the plaintiff claims should be declared to be valid and binding between the parties, in the replication relies on the written agreements, which allegedly provided that the 1981 oral agreement remained extant during and after the contract period of the 2015 written agreements.

[9]. It bears emphasising that, in its replication the plaintiff's cause of action is based on the 1981 oral agreement, which, according to replication, survived the 2015 written agreements (to be rectified), because these written agreements contained a clause to the effect that the 1981 oral agreement remains extant, as well as other provisions relating to payment in consideration for the use by the plaintiff of the premises.

[10]. Again, it may be apposite to cite *verbatim* the relevant passages from the plaintiff's replication, which reads, in the relevant part, as follows: -

- 1.1 It is admitted that the agreements referred to as the "first and second lease agreements", annexures P1 and P2 to the defendant's plea (the Parallel Agreements), were concluded.
- 1.2 However it was the common continuing intention of the parties that the Parallel Agreements did not detract from the agreement referred to in the plaintiff's particulars of claim and ran parallel to the said agreement for the periods set out in the Parallel Agreements.
- 1.3 As a result of a mutual error, the Parallel Agreements did not express such intention and the plaintiff is entitled to the rectification of the Parallel Agreements to express such intention.
- 1.4 As regards the first Parallel Agreement, i.e. annexure P1, such agreement accordingly ran parallel to the agreement referred to in the plaintiff's particulars of claim.
- 1.5 It follows that upon the expiration of the period of the first Parallel Agreement on 30th June 2018, the defendant did not become entitled to the eviction of the plaintiff from the premises referred to therein, but the plaintiff remained entitled to occupation thereof in perpetuity, on the basis that it would make payment to the defendant of an agreed rental in respect thereof and, failing agreement, a reasonable rental. [This provision accords with the wording of the alleged 1981 oral agreement, as pleaded by the plaintiff in its particulars of claim – see para [5] *supra*].
- 1.6 As regards the second Parallel Agreement, i.e. annexure P2 to the defendant's plea, it was the common continuing intention of the parties that the said second Parallel Agreement did not constitute a lease in respect of the water sports, but it was intended that the agreement would be as follows:
 - 1.6.1. The plaintiff would make payment of the amount set out therein relating to water sports as follows:
 - 1.6.1.1 5 percent of the turnover of the water sports in respect of the period from 1st July 2015 to 31st December 2015.
 - 1.6.1.2 8 percent of the turnover of the water sports in respect of the period from 1st January 2016 to 30th June 2018.
 - 1.6.1.3 R660 000 by 30th June 2018.
 - 1.6.2 Such agreement did not detract from the plaintiff's right to occupation of the water sports on the basis set out in paragraph 16 of the plaintiff's particulars of claim.
 - 1.6.3 From 1st July 2018, the plaintiff would continue to be entitled to occupy the water sports free of remuneration in perpetuity in accordance with the agreement referred to in paragraph 16 of the plaintiff's particulars of claim.
- 1.7 As a result of a mutual error, the said second parallel agreement did not express the above intention.
- 1.8 The said second Parallel Agreement accordingly falls to be rectified insofar as it reflects an agreement between the plaintiff and the defendant relating to the water sports as follows:
 - 1.8.1 To set out the terms expressed in 1.6 above.

- 1.8.2 By the deletion of the expression "Contract Type – Lease Agreement" and the substitution therefor of the words "Agreement".
- 1.8.3 By the deletion of the expressions "Lessor", "Lessor's" and "the Lessor" wherever same appear and the substitution therefor of the expressions "Sun City" or "Sun City's".
- 1.8.4 By the deletion of the expressions "Lessee", "Lessee's" and "the Lessee" wherever same appear and the substitution therefor of the expressions "Sun City Waterworld (Pty) Limited" or "Sun City Waterworld (Pty) Limited's".
- 1.9 As regards the facilities referred to in the second Parallel Agreement, it was the common continuing intention of the parties that the said agreement did not detract from the rights of the plaintiff to the occupation of the facilities on the basis set out in the plaintiffs particulars of claim and upon the expiration of the second Parallel Agreement in respect of the said facilities, the plaintiff remained entitled to occupation of the facilities on such basis.
- 1.10 As a result of a mutual error, the said second Parallel Agreement did not express such common intention.
- 1.11 In the premises the plaintiff is entitled to the rectification of the said second Parallel Agreement to express the intention set out in 1.9 above.
- 1.12 The defendant did not exercise the options contained in the Parallel Agreements and they accordingly terminated on 30th June 2018.
- 1.13 The plaintiff has complied with its obligations in terms of the Parallel Agreements.
- 1.14 The agreement referred to in the plaintiff's summons remains of full force and effect and the defendant remains entitled to occupation of the water sports and the facilities in terms thereof.' (Emphasis added).

[11]. On 17 October 2018, the defendant, after having followed the procedures prescribed by Uniform Rule of Court 23(1)(a) and (b) raised an exception to the plaintiff's replication to defendant's plea on the basis that the replication is vague and embarrassing, alternatively, do not contain the necessary averments to disclose a cause of action. We interpose here to note that, although the notice of exception states that the alternative basis for the exception is that the replication lacks averments which are necessary to sustain an action or defence, the defendant's case in the High Court and in this appeal has always been that the replication is vague and embarrassing.

[12]. The grounds of exception are in sum that the plaintiff's claim for the rectification of the 2015 written agreements is a new cause of action. In its

exception, the defendant puts it thus: 'The plaintiff has therefore preferred and formulated a new cause of action in its replication.' The defendant contends that it is a fundamental principle of our law that a cause of action, new or otherwise, cannot be brought in a replication. Therefore, so the argument is concluded, the plaintiff's replication is vague and embarrassing as the defendant cannot respond thereto.

[13]. The court *a quo* agreed with the defendant and, in upholding the exception with costs, concluded at para 15 of the judgment *a quo* as follows: -

'It is my conclusion, as counsel for the defendant also contended, that it is vague and embarrassing to allege on the one hand that an oral agreement governed the relationship between the parties as the plaintiff does in its particulars of claim, and then on the other hand, to allege that the written agreement relied on by the defendant should be rectified. The excipient has taken issue with the latest allegation based on a written contract, P2. This indisputably, as I find, strikes at the root of the pleading and results in the replication being excipiable for being vague and embarrassing. The rule 23(1) application is therefore meritorious.'

[14]. The issue to be considered in this appeal is simply whether the court *a quo* was correct in its finding that the plaintiff's replication to the defendant's plea is excipiable as being vague and embarrassing.

[15]. Before we consider the exceptions raised by the defendant and the grounds on which it is based, it is necessary to have a brief overview of the applicable general principles relating to exceptions. These general principles, as gleaned from the case law and conveniently summarised by this Court (per Maier-Frawley J) in *Merb (Pty) Ltd v Matthews*³, can be summarised as follows.

[16]. In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action. The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect

³ *Merb (Pty) Ltd v Matthews* 2021 JDR 2889 (GJ).

oneself against an embarrassment which is so serious as to merit the costs even of an exception.

[17]. The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed. An excipient who alleges that a pleading does not disclose a cause of action or a defence, must establish that, upon any construction of the pleading, no cause of action or defence is disclosed.

[18]. An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit. Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained. Minor blemishes and insignificant embarrassments caused by a pleading can and should be cured by further particulars.

[19]. Having said the foregoing, however, exceptions are to be dealt with sensibly since they provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility and insofar as interpretational issues may arise, the mere notional possibility that evidence of surrounding circumstances may influence the issue should not necessarily operate to debar the Court from deciding an issue on exception.

[20]. Importantly, for purposes of this judgment, as was held at para 13 in *Merb*, relying on the authority in *City of Cape Town v National Meat Suppliers Ltd*⁴, an exception to a pleading on the ground that it is vague and embarrassing requires a two-fold consideration: (i) whether the pleading lacks particularity to the extent that it is vague; and (ii) whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced in the sense that he/she cannot plead or properly prepare for trial. The excipient must demonstrate that the pleading is

⁴ *Cape Town v National Meat Suppliers Ltd* 1938 CPD 59 at 65.

ambiguous, meaningless, contradictory or capable of more than one meaning, to the extent that it amounts to vagueness, which vagueness causes embarrassment to the excipient.

[21]. In the context of exceptions to replications and exceptions based on an allegation that a new cause of action is introduced by a plaintiff in a replication, we also had regard to the following authorities and the principles enunciated therein.

[22]. In *Ilima Projects (Pty) Limited (in liquidation) v MEC: Public Transport, Roads and Works*⁵, the question arose as to whether an exception to a replication could be raised. The court, per Van der Linde J, held that there is no procedural objection in principle to an exception to a replication. Although rare, so the court held, such an exception appears not to be *per se* impermissible. At paras [5] and [6] the court held as follows: -

[5] A replication is required to contain an answer to the plea, but not an adumbration of the cause of action set out in the particulars of claim. If it does the later, it "departs" from the particulars of claim, and this is impermissible. No doubt the provisions of rule 30 relating to irregular proceedings are wide enough to permit of an application to strike out a replication which constitutes a departure. The point is, the replication can by definition not be required to contain all the averments necessary to sustain a cause of action; that is not its function.

[6] However, if a bad answer opens the door to evidence, it may in the interest of justice be advisable to have the bad answer weeded out early in the process before the expense of pre-trial preparation is embarked upon.'

[23]. We respectfully agree and associate ourselves with these pronunciations by Van der Linde J. The simple point to be made is that the question is whether the replication provides an answer to the defendant's plea which sustains its original cause of action and whether the answer informs the defendant adequately so as to meet the plaintiff's case.

⁵ *Ilima Projects (Pty) Limited (in liquidation) v MEC: Public Transport, Roads and Works* 2019 JDR 0567 (GJ).

[24]. In *Hosking NO v The Attorneys Fidelity Fund Board of Control; Voysey NO v The Attorneys Fidelity Fund Board of Control*⁶ it was held that if new allegations made in the replication have the effect of widening the scope of the action, the replication is excipiable on the ground of variance between it and the particulars of claim. The aforesaid requires a qualitative analysis of such embarrassment. Only when the embarrassment is so serious as to cause prejudice will the exception be allowed. The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

[25]. In *Levithan v Newhaven Holiday Enterprises CC*⁷ it was held that the prejudice to a litigant faced with an embarrassing pleading must ultimately lie in an inability properly to meet his opponent's case.

[26]. Applying the foregoing principles *in casu*, we are not persuaded that the manner in which the plaintiff's replication to the defendant's plea is worded and formulated renders it vague and embarrassing. We also do not accept that in the replication the plaintiff has preferred and formulated a new cause of action – far from it.

[27]. A thorough and proper consideration of the plaintiff's particulars of claim, read in conjunction with the replication to the defendant's plea, reveals that the plaintiff's case is and has always been that it is entitled to occupation of the premises in question on the basis of the 1981 oral agreement. This agreement provided, so the plaintiff's case is pleaded, that it is entitled to occupation of the premises in perpetuity free of any rental or other remuneration for so long as the plaintiff provided such water sports and recreational services to the guests and visitors at Sun City. By virtue of the conduct of the parties and their dealings with each other subsequent to the conclusion of the 1981 oral agreement, the agreement in respect of each of the facilities 'developed' to incorporate an agreement that the plaintiff would be obliged to make payment to the defendant

⁶ *Hosking NO v The Attorneys Fidelity Fund Board of Control; Voysey NO v The Attorneys Fidelity Fund Board of Control* 2008 JDR 0627 (SE).

⁷ *Levithan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C).

of an agreed rental in respect of the occupation of the facilities and, failing such agreement, a reasonable rental.

[28]. This is also the case on behalf of the plaintiff on a proper reading of the replication, which reiterates that the plaintiff is entitled to occupation of the premises on the basis of the 1981 oral agreement, which, so the replication avers, survived the 2015 written agreement by virtue of the express terms of the said written agreements, to be rectified. The only difference between the case made out in the plaintiff's particulars of claim and that made out in the replication is that the 1981 oral agreement, according to the replication, owes its continued existence and the fact that it remains relevant and applicable post the 2018 expiration of the written agreements to those agreements. We reiterate that the basis of the plaintiff's cause of action in the particulars of claim and in the replication is the 1981 oral agreement.

[29]. We conclude that the plaintiff in its replication strives to show why there was an oral agreement in existence throughout. Whether the version of the plaintiff in that regard is untenable in law is not in issue. The defendant confined the exception to the averment that a new cause of action is preferred in the replication. Nor can the issue be decided on probabilities.

[30]. It is, as contended on behalf of the plaintiff, that a claim for rectification is *per se* not necessarily in and of itself a cause of action. It can, as is the case *in casu*, be raised as a response to a defence raised by a defendant – a response to a defence raised by the opposing party.⁸

[31]. In his written heads of argument, Mr Berkowitz, Counsel for the defendant, also contended that the facts, as pleaded by the plaintiff in its replication in relation to the rectification claim, are so improbable and unlikely that it should be rejected out of hand. We understand the argument to be that, because the facts as pleaded by the plaintiff in its replication are so improbable, all things

⁸ *Grallo (Pty) Limited v D E Claassen (Pty) Limited* 1980(1) SA 816 (A) at 824 B-C.

considered, the exception was rightly upheld by the court *a quo* on the basis that the claim for rectification is unsustainable.

[32]. This argument loses sight of the settled and trite principle that exceptions do not deal with factual disputes and are adjudicated on the basis of and on the understanding that the facts, as pleaded, are accepted. We therefore reject this argument.

[33]. Also, the argument, based on *Levin V Zoutendijk*⁹, relating to the fact that the exact wording of the rectified contract and where it is to be inserted, does not hold water. The simple point is that this ground was not raised in the exception, which, as already indicated, is based on an averment that a new cause of action was preferred. There are no complaints or criticism in the exception about the formulation of the alleged new cause of action.

[34]. The replication provides an answer to the defendant's plea. It is not departing from its original cause of action. There is no variance between the replication and the particulars of claim. The defendant is able to meet the plaintiff's case. We are fortified in our foregoing view by the case authorities referred to above that a replication is not required to disclose a cause of action – that it is not the function of a replication.

[35]. In sum, we are of the view that the plaintiff's replication is not vague and embarrassing. It cannot, in our judgment, be said with any conviction that the defendant has demonstrated that the plaintiff's replication is ambiguous, meaningless, contradictory or capable of more than one meaning, to the extent that it amounts to vagueness, which vagueness causes embarrassment to the excipient. The appeal should therefore succeed.

[36]. There is one more issue which, although not before us, we think we should briefly touch on. And that relates to an application by the defendant in terms of

⁹ *Levin V Zoutendijk* 1979 (3) SA 1145 (W).

rule 30, which the defendant launched simultaneously with the exception. In that rule 30 application, the defendant contended that the plaintiff's replication to the defendant's plea was an irregular proceeding which should be set aside in terms of rule 30. The said application was premised on exactly the same grounds on which the exception was based, that being that the plaintiff made out an altogether new cause of action in its replication.

[37]. The High Court did not deal with this rule 30 application in light of its findings in relation to the exception. As already indicated above, this matter is also not presently before us and it is not necessary for us to rule on it. Suffice to say that, in our view, and having regard to our findings in relation to the exception, the rule 30 application should suffer the same fate as the exception.

[38]. For these reasons, the court *a quo* misdirected itself in upholding the exception. The appeal must, accordingly, succeed.

Costs

[39]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*¹⁰.

[40]. We can think of no reason why we should deviate from this general rule. The respondent should therefore be ordered to pay the appellant's costs of the opposed appeal.

Order

[41]. In the result, the following order is granted: -

- (1) The appellant's appeal against the order of the court *a quo* is upheld, with costs.

¹⁰ *Myers v Abramson*, 1951(3) SA 438 (C) at 455;

- (2) The order of the court *a quo* is set aside and in its place is substituted the following: -

'The defendant's exception to the plaintiff's replication to the defendant's plea fails and is dismissed, with costs.'



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg



G M YOUNG
Acting Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	23 October 2024
JUDGMENT DATE:	28 October 2024
FOR THE APPELLANT:	N Segal
INSTRUCTED BY:	Cranko Karp & Associates Incorporated, Saxonwold, Johannesburg
FOR THE RESPONDENT:	A B Berkowitz
INSTRUCTED BY:	Knowles Husain Lindsay Incorporated, Sandown, Sandton