



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

(1) (2) (3)	REPORTABLE: NO OF INTEREST TO OTHER JUDGES: NO REVISED: YES/NO
<u>06/03/2025</u> DATE	 [REDACTED SIGNATURE] SIGNATURE

CASE NO: 2023-061832

In the matter between:

FLM SA (PTY) LIMITED

Plaintiff

And

SEQUENCE LOGISTICS (PTY) LIMITED

Defendant

Neutral Citation:

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.

JUDGMENT

SENYATSI J

Introduction and background

- [1] The first application concerns an exception to the particulars of claim following the claim of damages by the respondent (the plaintiff) in the main case. The second application concerns costs application brought in terms of Rule 30A of the Uniform Rules. However, the Rule 30 application which had been instituted by the plaintiff was withdrawn without the tender of costs to the defendant. It is because of the withdrawal of the application without the tender for costs that the defendant brings the application for a costs order against the plaintiff for withdrawing the irregular proceedings application brought in terms of Rule 30 that the defendant seeks the costs order.
- [2] The main claim relates to alleged damages caused by the loss of stock of beef kept by the applicant (defendant) in terms of the cold storage warehousing agreement between the parties. For convenience's sake the parties will be referred to as in the main case. The defendant initially raised three grounds of exception. However, it has abandoned the first ground of exception and therefore only the second and the third ground will be considered.
- [3] The plaintiff's cause of action relates to two claims, "Claim A" in respect of the alleged loss that during September 2022 ("the first tranche of meat") weighing 9 148.65 kg and October 2022. It avers in its particulars of claim that the defendant caused the meat that was warehoused on behalf of the plaintiff to be lost whilst in its care and that the aggregate value of the loss is R769 792.12. Claim B, so states the plaintiff in its particulars of claim, relates to the loss of meat weighing 1596.85 kilograms during May

2023(“the second tranche of meat”) and the alleged aggregate loss is R116 570.05.

- [4] I will deal with the exception application first and thereafter with the costs application.

Grounds of exception

- [5] Initially, the defendant raised three grounds of exception. However, it abandoned the first ground of exception which was confirmed in the joint practice note filed by the parties. Only the second and third ground of exception will be dealt with in this judgment.

The second ground of exception

- [6] The defendant avers that in paragraph 22 of the particulars of claim, the plaintiff alleges that it suffered damages because of the defendant's “wilful misconduct and/or gross negligence”. It contends that the allegations of wilful misconduct and gross negligence are conclusions of law. The defendant contends that the plaintiff has not pleaded any fact from which the defendant could possibly ascertain that it acted in a manner that amounts to either misconduct of wilful nature; and/or gross negligence (to the extent that such an allegation is permissible). The defendant, furthermore, states that the particulars of claim do not aver sufficient facts to sustain a cause of action.

The third ground of exception

- [7] The defendant states that in paragraphs 13 and 17 of the particulars of claim, the plaintiff alleges that it had instructed the defendant to release the alleged stock during September 2022 and May 2023 respectively. Furthermore, so continues the defendant, in paragraphs 15 and 19 of the

particulars of claim, the plaintiff alleges that it became aware of the alleged loss of its stock on 14 October 2022 and 10 May 2023 respectively. The defendant contests and states that in paragraph 23 of the particulars of claim, the plaintiff alleges that on 22 May 2023, it made demand from the defendant in respect of damages that it allegedly suffered.

- [8] The defendant contends that Clause 2.3 of the alleged contract provides that:

“Any claim made by the Customer must be made to the Company prior to, or at the time, of the removal of the goods in question from the premises of the Company or such other later date, not exceeding 3(three)days thereafter, by which the Customer might reasonably be expected to become aware of aware thereof, failing which the claim shall be deemed to have prescribed and shall be of no legal force or effect”

- [9] The defendant contends that the plaintiff was aware of the defendant’s identity and the facts upon which its supposed claim was based, alternatively had it exercised reasonable care, it could and should have acquired such knowledge in respect of its first claim, before 14 October 2022 and in respect of the plaintiff’s second claim, before 10 May 2023.

- [10] Furthermore, the defendant states that the plaintiff’s 22 May 2023 demand occurred more than three days after September 2022 and 14 October 2022 and 10 May 2023. It contends that absent a claim having been made to the defendant in accordance with clause 2.3 of the alleged contract, the plaintiff is contractually time barred from prosecuting the claims, and that the particulars of claim do not aver sufficient facts to sustain a cause of action

[11] The defendant contends that based on the two grounds of exception set forth herein, the exception should be upheld.

The Plaintiff's rebuttal of the two grounds of exception

Second ground of exception.

[12] In rebutting the second ground of exception, the plaintiff avers that the second ground of exception constitutes an unfounded and inappropriate reliance on Rule 23 as the allegation of the defendant's breach arising from the wilful misconduct, alternatively gross negligence, discloses a cause of action against the defendant which it may plead without suffering any prejudice.

Third ground of exception

[13] With regards to the third ground of exception alleged by the defendant, the plaintiff contends that the defendant erroneously concludes the existence of the dispute with respect to any averment results in such averment not being pleaded correctly or at all. The plaintiff avers that the third ground of exception constitutes an unfounded and inappropriate reliance on Rule 23 because, firstly, the averments based on the contractual damages have been correctly pleaded and so avers the plaintiff, they disclose a cause of action against the defendant and the averments can be pleaded to without prejudice.

[14] Secondly, so the argument continues by the plaintiff, the averments made by the plaintiff are exclusive of those averred by the defendant in its exception which the defendant alleges are required of the plaintiff. The

plaintiff concludes that the defendant is abusing Rule 23, which should be invoked once the pleadings have closed.

Issue for determination

- [15] The first issue for determination is whether the particulars of claim disclose the cause of action. The second issue is whether the plaintiff is liable for costs of withdrawal of the Rule 30 and 30A applications without tendering costs. I will deal with the first issue and thereafter the second issue.

Legal principles on exceptions

- [16] Before I deal with the general legal principles on exceptions as developed by our common law through various courts judgments, it is important to state that the procedure on exceptions is regulated by Rule 23(1) of the Uniform Rules which provides as follows:

“(1) 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 apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that—

(a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and

(b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.”

[17] In *Merb (Pty) Ltd v Matthews*¹ the following useful summary of the some of the general principles applicable to exceptions is made⁵⁹ by Maier-Frawley J:

“8. These were conveniently summarised by Makgoka J in *Living Hands*² as follows: ‘Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

- (a) 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.
- (b) 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 oneself against an embarrassment which is so serious as to merit the costs even of an exception.
- (c) 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.
- (d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
- (e) 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.
- (f) 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.
- (g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.’”

¹ 2020 (3) SA 535 (ECP) at para [21]. See also the authorities cited therein.

² *Living Hands (Pty) Ltd v Ditz*, 2013 (2) SA 368 (GSJ) at 374G.

[18] 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 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.’³

[19] An exception should be dealt with sensibly and not in an over-technical manner.⁴ Thus, it is ‘only if the court can conclude that it is impossible to recognize the claim, irrespective of the facts as they might emerge at the trial, that the exception can and should be upheld’.⁵

[20] If the exception is successful, the proper course for the court is to uphold it. When an exception is upheld, it is the pleading to which exception is taken which is destroyed. The remainder of the evidence does not crumble.⁶ The upholding of an exception to a declaration or a combined

³ See Erasmus- Commentary on Rule 23(1).

⁴ See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465H. See also *Jake Trading CC v Rambore (Pty) Ltd t/a Rambore Specialist Contractors* (unreported, WCC case no 11909/2017 dated 13 March 2019) at paragraph [32]; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [9]; *Luke M Tembani v President of the Republic of South Africa* (unreported, SCA case no 167/2021 dated 20 May 2022) at paragraph [14]; *Altcoin Trader (Pty) Ltd v Basel* (unreported, GJ case no 28739/2021 dated 12 September 2022) at paragraph [6]; *Lovell v Lovell* (unreported, GP case no 24583/2009 dated 22 September 2022) at paragraph [15].

⁵ *Luke M Tembani v President of the Republic of South Africa* (unreported, SCA case no 167/2021 dated 20 May 2022) at paragraph [16]; *Lovell v Lovell* (unreported, GP case no 24583/2009 dated 22 September 2022) at paragraph [16]; *Shopfitters Studio (Pty) v Ltd Dynamic Design Upholstery (Pty) Ltd* (unreported, GP case no 27419/2021 dated 28 November 2022) at paragraph [10].

⁶ *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1991 (3) SA 787 (T) at 791H; *Princeps (Edms) Bpk v Van Heerden* NO 1991 (3) SA 842 (T) at 845A–F. The contrary view taken in *Natal Fresh Produce Growers’ Association v Agroservice (Pty) Ltd* 1991 (3) SA 795

summons does not, therefore, carry with it the dismissal of the summons or of the action.⁷ The unsuccessful party may then apply for leave to amend the particulars of claim. It is, in fact, the invariable practice of the courts, in cases where an exception has successfully been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period.⁸

[21] If a pleading is bad in law, the answer is to except;⁹ if it is vague and embarrassing, notice to cure may be given or further particulars (for purposes of trial) may be requested; and if the legal representative for a party has been genuinely taken by surprise by his opponent's reference to the cause of action in the opening address, he should take the opportunity to say so at the outset and object to the evidence if it does not accord with

(N) at 800F–801C was expressly rejected by the Appellate Division in *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 603C–D; *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348H–349A; *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Co (South Africa) Ltd* 2018 (3) SA 405 (SCA) at 409C; *Thipe v City of Tshwane Metropolitan Municipality* (unreported, SCA case no 254/2019 dated 16 October 2020) at paragraph [23].

⁷ *Johannesburg Municipality v Kerr* 1915 WLD 35 at 37; *Berrange v Samuels II* 1938 WLD 189 at 190; *Santam Insurance Co Ltd v Manqele* 1975 (1) SA 607 (D) at 610C; *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1991 (3) SA 787 (T) at 791H–I; *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 603C–H; *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348C–E; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 219A–B.

⁸ *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602D; *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269H; *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 167G–I; *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348C–F; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 219A–B; *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 302G; *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Co (South Africa) Ltd* 2018 (3) SA 405 (SCA) at 409C–E; *Thipe v City of Tshwane Metropolitan Municipality* (unreported, SCA case no 254/2019 dated 16 October 2020) at paragraph [23]. For a case where an exception was upheld and the plaintiff's claim dismissed without leave to amend, see *LM v DM* 2021 (5) SA 607 (GP) at paragraph [50].

⁹ *Trustee, Bus Industry Restructuring Fund v Break Through Investments CC* 2008 (1) SA 67 (SCA) at paragraph [11]; *Hill NO v Strauss* (unreported, GJ case no 13523/2020 dated 2 July 2021) at paragraph [14]; *Taitz Cellular (Pty) Ltd t/a Blue Cellular v Chadez Enterprises (Pty) Ltd* (unreported, GJ case no 29643/2021 dated 3 August 2022) at paragraph 12).

the pleadings. What a party cannot do, is to sit back, say nothing and then complain that the pleading is defective and that he was taken by surprise.¹⁰

[22] The test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows:¹¹

- a) In each case the court is obliged first to consider whether the pleading does lack particularity to an extent amounting to vagueness. If a statement is vague, it is either meaningless or capable of more than one meaning.¹² To put it at its simplest: the reader must be unable to distil from the statement a clear, single meaning.¹³
- (b) If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of.¹⁴
- (c) In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he

¹⁰ MN v AJ 2013 (3) SA 26 (WCC) at 33H and 35G–I; ETG Agro (Pty) Ltd v Varuna Eastern Cape (Pty) Ltd (unreported, ECG case no 5206/2016 dated 3 May 2021) at paragraph [6].

¹¹ See Lockhat v Minister of the Interior 1960 (3) SA 765 (D) at 777A–E; Quinlan v MacGregor 1960 (4) SA 383 (D) at 393F–H; Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 211B; Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd 2014 (2) SA 157 (GNP) at 166H–J.

¹² Leathern v Tredoux (1911) 32 NLR 346 at 348; Callender-Easby v Grahamstown Municipality 1981 (2) SA 810 (E) at 812H; Wilson v South African Railways and Harbours 1981 (3) SA 1016 (C) at 1018H; Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) at 644A–B.

¹³ Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) at 644B.

¹⁴ Quinlan v MacGregor 1960 (4) SA 383 (D) at 393E–H; Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 211B; ABSA Bank Ltd v Boksburg Transitional Local Council 1997 (2) SA 415 (W) at 421I–422A. In International Tobacco Co of SA Ltd v Wollheim 1953 (2) SA 603 (A) at 613B and Lockhat v Minister of the Interior 1960 (3) SA 765 (D) at 777B it is said that it must be shown that the excipient will be ‘substantially embarrassed’ by the vagueness or lack of particularity.

objects.¹⁵ A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.

(d) The ultimate test as to whether the exception should be upheld is whether the excipient is prejudiced.¹⁶

[23] A summons will be vague and embarrassing where it is not clear whether the plaintiff sues in contract or in delict,¹⁷ or upon which of two possible delictual bases he sues,¹⁸ or what the contract is on which he relies,¹⁹ or whether he sues on a written contract or a subsequent oral contract,²⁰ or if it can be read in any one of several different ways,²¹ or if there is more than one claim and the relief claimed in respect of each is not separately set out.²²

¹⁵ *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W) at 421J–422A; *Venter and Others NNO v Barritt*; *Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 645C–D; *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)* 2010 (1) SA 627 (C) at 630B.

¹⁶ *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393G; *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211B; *Francis v Sharp* 2004 (3) SA 230 (C) at 240E–F; *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)* 2010 (1) SA 627 (C) at 630B; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [11]. Whether the excipient is prejudiced involves ‘a factual enquiry and a question of degree, influenced by the nature of the allegations, their contents, the nature of the claim and the relationship between the parties’ (*Lovell v Lovell* (unreported, GP case no 24583/2009 dated 22 September 2022) at paragraph [20] and the authorities there referred to).

¹⁷ *Brodovsky v Ackerman* 1913 CPD 996; *Wellworths Bazaars Ltd v Chandlers Ltd* 1948 (3) SA 348 (W); *Dunn and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C); *Gerber v Naude* 1971 (3) SA 55 (T); *Pocket Holdings (Pvt) Ltd v Lobel’s Holdings (Pvt) Ltd* 1966 (4) SA 238 (R); *Benteler South Africa (Pty) Ltd v Morris Material Handling SA (Pty) Ltd t/a Crane Aid* (unreported, ECGq case no 3354/2021 dated 16 August 2022) at paragraph [15].

¹⁸ *Kock v Zeeman* 1943 OPD 135.

¹⁹ *Luttig v Jacobs* 1951 (4) SA 563 (O).

²⁰ *Herbst v Smit* 1929 TPD 306.

²¹ *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 454; *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 812H; *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1018A; *Benteler South Africa (Pty) Ltd v Morris Material Handling SA (Pty) Ltd t/a Crane Aid* (unreported, ECGq case no 3354/2021 dated 16 August 2022) at paragraph [13].

²² *Kock v Zeeman* 1943 OPD 135 at 139; *Greyvenstein v Hattingh* 1925 EDL 308.

[24] It has been held in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*²³, the Constitutional Court held that “The excipient must satisfy the court that the conclusion of law pleaded by a defendant cannot be supported by any reasonable interpretation of the particulars of claim.²⁴ In adjudicating an exception, the facts pleaded by the defendants must all be accepted as true.²⁵”

Analysis of the particulars of claim and reasons

[25] Before I analyse the particulars of claim and reasons, it is important to consider the authorities relied on by the defendant for the proposition that the remaining two grounds of exception should be upheld. I will refer to some of those cases.

[26] In seeking to persuade me, Mr Pye SC referred to various cases which he says supports the proposition that the two grounds of exceptions should be upheld. I have considered the cases referred to me by Mr. Pye SC. In my view the facts of those cases are different from the instant case.

[27] I therefore hold the view that the defendant can plead to the particulars of claim and raise whatever defence it deems necessary. Consequently, the defendant will not be embarrassed by pleading to the particulars of claim raised herein.

²³ CCT 66/21) [2022] ZACC 37; 2023 (2) SA 68 (CC); 2023 (7) BCLR 779 (CC) at para 41

²⁴ *Baliso v Firststrand Bank Ltd t/a Wesbank* [2016] ZACC 23; 2017 (1) SA 292 (CC); 2016 (10) BCLR 1253 (CC).

²⁵ *Stewart v Botha* [2008] ZASCA 84; 2008 (6) SA 310 (SCA) at para 4.

Order

[28] The exceptions are dismissed with costs.



ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 15 October 2024

DATE JUDGMENT HANDED DOWN: 06 March 2025

APPEARANCES

Counsel for the Applicant: Adv Pye SC
Instructed by: Andre Pienaar and Associates

Counsel for the Respondent: Adv Marc Cooke
Instructed by: David C Feldman Attorneys