

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: 38718/2014

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED <u>✓</u>
<u>19/05/2015</u> DATE	
<u>[Signature]</u> SIGNATURE	

LANCE WILLIAM HOUGHTON

Plaintiff

and

BRORON TECHNOLOGIES AFRICA (PTY) LIMITED
PAUL MICHAEL BROSNIHAN
GAIL ANNE BROSNIAN N.O.
GARETH WELLS WILLIAMS N.O.
CLIFFORD WELLS WILLIAMS N.O.
PAUL MICHAEL BROSNIHAN N.O.
COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION

First Defendant
Second Defendant
Third Defendant
Fourth Defendant
Fifth Defendant
Sixth Defendant
Seventh Defendant

JUDGMENT

OPPERMAN AJ

INTRODUCTION

1. The First to Sixth Defendants ("**the Excipients**") have excepted to the Plaintiff's particulars of claim on the basis that the Plaintiff's particulars of claim fail to disclose a cause of action alternatively are vague and embarrassing.

APPLICABLE LEGAL PRINCIPLES

Exceptions : no cause of action

2. As stated in *McKelvey v Cowan* NO 1980 (4) SA 525 (Z) at 526D-E:
"It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action."
3. In *Frank v Premier Hangers CC* 2008 (3) SA 594 (C) Griesel J stated as follows at para [11] page 600 :
"[11] 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 this, the exception ought not to be upheld."
4. In *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) Marais JA stated as follows at para [7] page 997 :
"[7] It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that

*ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law.*¹

Exceptions : Vague and embarrassing

5. With regard to an exception on the basis of a pleading being vague and embarrassing, the onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. An exception that the pleading is vague and embarrassing may be taken only when the vagueness and embarrassment strikes at the root of the cause of action as pleaded.
6. It therefore is incumbent on a plaintiff to plead only a complete cause of action that identifies the issues on which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it. An attack mounted by a defendant that particulars of claim are vague and embarrassing cannot be found on the mere averment that they are lacking in particularity, and where the complaint is one of a lack of particularity the remedy is to request discovery or particulars for trial. See *Nel and Others NNO V McArthur and Others* 2003 (4) SA 142 (T) at 147A/B - B, E/F - F/G and H/I, 148H - I/J, 148D/E - F, 149E/F - G/H, *Jowell v Bramwell-Jones and Others supra* at 902B-D, H - I and *Koth Property Consultants supra* para [17], [18] at 30, 31. Furthermore (as per *Jowell v Bramwell-Jones and Others supra* at 902I-903E), a distinction must be drawn between the *facta*

¹ See also *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* 2006 (2) SA 25 (T) para [9] at 28, 29; *FNB of SA Ltd v Perry NO* 2001 (3) SA 960 (SCA) para [6] at 965; *Klokow v Sullivan* 2006 (1) SA 259 (SCA) para [15] at 265.

probanda, or primary factual allegations which every plaintiff must make, and the *facta probantia*, which are the secondary allegations upon which the plaintiff will rely in support of his or her primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence.

7. Each of the Excipients' complaints in their Rule 23(1) notice are dealt with below.

GROUND OF EXCEPTION

First complaint (Paragraph 9 and 9.1 of the Particulars of Claim)

8. The relevant portions of paragraph 9 read as follows:
 - "9. *The Plaintiff and the Second Defendant:-*
 - 9.1 *are each shareholders of the First Defendant who own 50% of the issued shares in the First Defendant;"*
9. The Excipients contend that paragraph 9.1 should be read to mean that the First Defendant owns 50% of the shares in the First Defendant.
10. Paragraphs 10 and 10.2 record the following:
 - "10. *Notwithstanding what is stated in paragraph 9 above, the securities register of the First Defendant:-*
 - 10.1 *.....*
 - 10.2 *does not record the Plaintiff and the Second Defendant as shareholders of the First Defendant to each of whom 50% of the issued shares in the First Defendant have been issued."*
11. In paragraph 13 Plaintiff pleads that he is entitled to an order that he and the Second Defendant are shareholders of the First Defendant as to 50% each of the issued share capital of the First Defendant.

12. Paragraph 9.1 does not state that the First Defendant owns 50% of the shares in the First Defendant. What paragraph 9 states is that the Plaintiff and the Second Defendant are each shareholders in the First Defendant and that the Plaintiff and the Second Defendant (not the First Defendant) each own 50% of the issued shares in the First Defendant.
13. The construction the Excipients contend should be given to paragraph 9 would have required that the words 'who own' in paragraph 9.1 be substituted with the words 'which owns'.
14. Having regard to the pleading as a whole, and in particular, the quoted portions of paragraphs 10 and 13, the only reasonable interpretation which can be given to paragraph 9.1 is that the shares in the First Defendant are owned 50% each by the Plaintiff and the Second Defendant (bearing in mind that this is not the test for excipiability based on the failure to disclose a cause of action, it being sufficient that it be one of a number of interpretations). I also find that the paragraph is not vague and embarrassing.

Second complaint (lack of particularity)

15. The complaint raised by the excipients is that insufficient information has been pleaded and that such lack of particularity prejudices the Excipients from pleading to the particulars of claim.
16. For the Plaintiff to have disclosed a cause of action he was required to plead that he was the owner of the shares or had an entitlement to the shares and that the Register does not reflect this. This he has done. The deficiencies in the Plaintiff's particulars of claim complained of by the

Excipients are typical of the particulars to be sought in a request for trial particulars.

17. Where a complete cause of action is pleaded, as is the case, but the complaint is that of a lack of particularity, i.e. *facta probantia* or evidence as opposed to *facta probanda* or the essential elements of a cause of action, an exception is not competent and instead the complaint is cured by a request for particulars.

Third complaint (Time allowed for appearance)

18. Section 24 of the Superior Courts Act 10 of 2013 states as follows:

“24 Time allowed for appearance

The time allowed for entering an appearance to a civil summons served outside the area of jurisdiction of the Division in which it was issued, shall be not less than-

*(a) **one month** if the summons is to be served at a place more than 150 kilometres from the court out of which it was issued; and*

(b) two weeks in any other case.”

19. The Plaintiff's summons does not state that the Fourth and Fifth Defendants are entitled to one month to enter an appearance to defend. Instead, the summons states that the Fourth and Fifth Defendants (all the Defendants) have 10 days to enter an appearance to defend.
20. Nevertheless, the Fourth and Fifth Defendants will remain entitled, in terms of Section 24(1) of the Superior Courts Act, to one month to enter an appearance to defend.

21. Furthermore the Fourth and Fifth Defendants have in fact entered an appearance to defend, and all of the Excipients are represented by the same attorneys.

22. In *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991 (1) SA 823 (T) Goldstein J (as he then was) stated as follows at 824E-G:

*"The defendant now contends that the service authorised by this Court on 15 May 1990 was in conflict with the Rules of Court and that allowing the defendant only 10 days to enter appearance breached the provisions of s 27 of the Supreme Court Act 59 of 1959. I shall assume that both these contentions are valid. I accept too that defendant is correct in contending that I have no power to abridge the period laid down in s 27. See *Shield Insurance Co Ltd v Van Wyk* 1976 (1) SA 770 (NC). It seems to me, however, that, once a defendant has entered appearance to defend as it has done in the present matter, non-compliance with the Rules as to service and with s 27 becomes irrelevant. The purpose of service in terms of the Rules is to bring the edictal citation to the attention of the defendant and the purpose of s 27 is to ensure that such defendant has sufficient time to defend if it so wishes. Both of these objectives have been achieved and the particular statutory provision and Rule have been exhausted."*²

23. In *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F-G Schreiner JA stated:

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to

² Emphasis added.

interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."³

24. The obvious error in the summons is of no consequence and does not occasion any prejudice to the Fourth and Fifth Defendants who are not prevented from pleading to the Plaintiff's particulars of claim by the error in respect of the time within which they have to enter an appearance to defend.

Fourth complaint (Failure to allege Defendants are majors)

25. The complaint is that the Plaintiff and the Defendants who are natural persons are cited as adults but not as majors.
26. The identity numbers of the Plaintiff and the Defendants who are natural persons are pleaded in the Plaintiff's particulars of claim, from which identity numbers the ages and status of the Plaintiff and the Defendants who are natural persons as majors can clearly be determined.

Fifth complaint (Seventh Defendant – outside jurisdiction of court)

27. The complaint is that the Seventh Defendant, the Companies and Intellectual Property Commission, is outside the jurisdiction of the court and should be afforded the two week period in terms of Section 24 of the Superior Courts Act.
28. This complaint is not for the Excipients to raise, who cannot be prejudiced thereby, but instead is for the Seventh Defendant to take.
29. The complaint is technical⁴ and meritless. The First to Sixth Defendants can plead to the Plaintiff's particulars of claim and are not prevented from

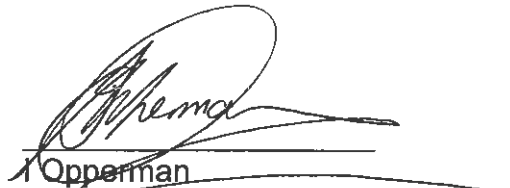
³ Emphasis added. See also SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO 1981 (4) SA 329 (O) at 334H-335E.

⁴ See Trans-African Insurance Co Ltd v Maluleka *supra* at 278F-G.

doing so by the Seventh Defendant being afforded 10 days instead of two weeks to enter an appearance to defend.

CONCLUSION

30. For the reasons set out herein, I find that there is no merit in any of the grounds for the exception raised and the exception is accordingly dismissed with costs.


J Opperman
Acting Judge of the High Court

Heard: 11 May 2015
Judgment delivered: 19 May 2015
Appearances:
For Excipients: Adv Venter
Attorneys: Whalley & Van Der Lith Inc
For Respondent: Adv L Hollander
Attorneys: Anthony Hinds Attorneys