REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NO. : 2014/40878

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

_____ _____
DATE SIGNATURE

In the matter between:

GLENCAROL (PTY) LIMITED **First Plaintiff**

O'NEILS IRIS INTERNATIONAL SPORTS COMPANY LTD **Second Plaintiff**

GLENMAR (PTY) LIMITED **Third Plaintiff**

AQUARELLA INVESTMENTS (PTY) LIMITED **Fourth Plaintiff**

And

EMERALD RISK TRANSFER LIMITED **First Defendant**

SANTAM LIMITED **Second Defendant**

THE LION OF AFRICA LIMITED **Third Defendant**

ZURICH INSURANCE COMPANY SA Ltd **Fourth Defendant**

JUDGMENT

OPPERMAN AJ

[1] The plaintiffs allege that they are indemnified under a short-term policy of insurance issued by the defendants on 16 July 2012 ("*the policy*"). The plaintiffs seek to be indemnified in terms of the policy for damage caused to certain equipment and for business interruption as a result of flooding that occurred on the 25th of January 2012.

[2] Four (4) claims were initially made by the plaintiffs under the policy:

2.1. the first claim was for the cost of rebuilding or replacing the equipment that was allegedly damaged;

2.2. the second claim was for an indemnification in respect of cancellation charges and penalties which the first plaintiff contended it had become liable for as a result of the damage to equipment;

2.3. the third claim was for a loss of gross profit due to a reduction in turnover in consequence of the flooding and damage to the equipment; and

2.4. the fourth and last claim was a claim for the loss of gross profit due to an increase in the cost of working as a result of the flood and damage to equipment.

[3] In relation to all four of the above claims, the plaintiffs, in their initial particulars of claim, alleged that they had notified the defendants of the flood and damage to equipment on the 2nd of February 2012 and that the defendants had wrongfully repudiated the claim which repudiation

the plaintiffs did not accept, and in consequence, the defendants were obliged to indemnify the plaintiffs in the amounts claimed as the policy ought to have reacted to the claims.

[4] The defendants considered the plaintiffs' particulars of claim to be excipiable and they delivered a notice in terms of Rule 23(1) of the Uniform Rules of Court, raising a number of complaints that required to be rectified. One such complaint was directed towards the plaintiffs' failure to identify which of the plaintiffs had suffered the damages arising from the flooding and which of the plaintiffs were seeking an indemnity under the policy. Another was the failure to allege when and how the defendants had repudiated the plaintiffs' claims.

[5] Arising from the notice in terms of Rule 23(1), the plaintiffs amended their particulars of claim and clarified that the claims advanced in their initial particulars of claim, were now claims advanced only by the first plaintiff. The remaining plaintiffs were cited purely because they were named as insured parties under the policy.

[6] The plaintiffs now also alleged that on the 2nd of February 2012, the first plaintiff orally notified the first defendant of the flood and damage to equipment and on the 7th of February 2013, the defendants in writing, wrongfully repudiated the plaintiffs' claim, which repudiation the plaintiffs did not accept and in consequence, the defendants were obliged to pay the first plaintiff the amounts claimed.

[7] The plaintiffs had failed to attach the written repudiation by the defendants dated the 7th of February 2013, but pursuant to a notice in terms of Rule 35(12) and (14), the plaintiffs furnished an email dated

the 7th of February 2013 ("*the email*") as constituting the letter of repudiation by the defendants.

[8] It is this email, and what the plaintiffs allege it constitutes, that form the focus of the defendants' exception. In a nutshell, the defendants contend that the email does not represent a repudiation as alleged by the plaintiffs and that the plaintiffs' reliance thereon is flawed, resulting in their amended particulars of claim being excipiable.

[9] The exception was initially taken both on the basis that the amended particulars of claim failed to disclose a cause of action and that it was vague and embarrassing. The defendants, during argument before this court, did not persist with the exception based on the ground that the particulars failed to disclose a cause of action and confine themselves to the question of whether it is vague and embarrassing.

[10] Rule 23(1) provides that an exception may be taken against a pleading on the grounds that it is vague and embarrassing. Such an exception strikes at the formulation of the cause of action and not its legal validity.[1]

[11] A pleading may be vague if it fails to provide the degree of detail necessary in a particular case properly to inform the other party of the case being advanced.[2] The typical prejudice which justifies an exception is if the allegations in the particulars of claim are such that the defendant is unable to plead properly.[3]

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1 *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269I

2 *Lockhat v Minister of Interior* 1960 (3) SA 765 (D) at 777D; *Nasionale Aartappelkoöperasie Bpk v PriceWaterhouseCoopers* 2001 (2) SA 790 (T) at 797J–798A

3 *Lockhat supra* at 777E

[12] The question is whether *"the embarrassment is, or is not, so serious as to cause prejudice to the excipient if he is compelled to plead to the paragraph in the form to which he objects"*. In order to answer this question, the Court is *"obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him, in his efforts to plead to the offending paragraph, by the vagueness complained of"*.[4]

[13] The evaluation of prejudice is a factual enquiry, and is a question of degree. The decision must necessarily be influenced by the nature of the allegations, their content, the nature of the claim and the relationship between the parties.[5]

[14] In *Jowell v Bramwell-Jones*[6] this Court referred to the following general principles insofar as exceptions are concerned:

"a. Minor blemishes are irrelevant: pleadings must be read as a whole; no paragraph can be read in isolation;

b. ...

c. a distinction must be drawn between the facta 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 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;

d. only facts need be pleaded; conclusion of law need not be pleaded; ..."[7]

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4 *Quinlan v McGregor* 1960 (4) SA 383 (D) at 393F-G

5 *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W) at 422A

6 1998 (1) SA 836 at 902J – 903B

7 *contra* Prinsloo v Woolbrokers Federation Ltd 1955 (2) SA 298 (N) at 299E, rule

[15] In *Jowell v Bramwell-Jones*,[8] it was also held that:

> *"an exception that a pleading is vague and embarrassing cannot be directed at a particular paragraph within a cause of action"*. An exception *"must go to the whole cause of action"*.

[16] Paragraphs 20, 31, 41 and 48 of the amended particulars of claim ("*the offending paragraphs*") all of which are identical and are repeated in the pleading under different claims read:

"On 7 February 2013 the Defendants (represented by the First Defendant) in writing wrongly repudiated the Plaintiffs' claim which repudiation the Plaintiffs did not accept."

The exception to this paragraph is that it is vague and embarrassing in that the email recording the "*writing*" does not evidence a repudiation of the first plaintiff's claim.

[17] The questions which fall for determination are:

17.1. Do the allegations contained in the offending paragraphs form part of the *facta probanda* of the first plaintiff's claims?

17.2. Does the email contain admissible evidence?

17.3. Does the email contradict the content of the offending paragraphs?

17.4. If so, does such contradiction render the amended particulars of claim excipiable?

[18] The first plaintiff's claim is for specific performance of the defendants' contractual obligations. That being so, an allegation of repudiation is

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8 *Supra* at 899D and 20(2)

not required to be made in order for the first plaintiff to sustain its cause of action.[9]

[19] In the Ndlovu [10] matter, Mthiyane JA (with whom Zulman JA, Cameron JA, Lewis JA and Comrie AJA concurred) held at para [14] p 248 as follows:

"In the present matter the appellant did not accept the respondent's repudiation and sued the respondent for specific performance on the agreement. It follows therefore that the repudiation was not a material fact which the appellant had to prove to establish his cause of action"

[20] The allegations pleaded in the offending paragraphs are thus not relevant to the issues which will fall for determination at the trial. This may have informed the decision on the part of the defendants not to persist in the objection that the pleading failed to disclose a cause of action.

[21] The defendants' complaint is, in a nutshell, that the email contradicts that which has been pleaded in the offending paragraphs. This contradiction between that which has been pleaded and the annexed document, so the argument goes, renders the particulars of claim vague and embarrassing.

[22] The contradiction lies in this: In the offending paragraphs, the first plaintiff contends that the defendants repudiated the claims in writing. If the defendants' argument is accepted, the email does not support such a finding but contains without prejudice settlement discussions which,

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9 Ndlovu v Santam 2006 (2) SA 239 SCA [14].

10 Supra

even if regard is had to it, do not evidence a refusal to honour the claims.

[23] A contradiction between an allegation pleaded and a document attached in support of such allegation, would, generally, lead to a conclusion that the particulars of claim are vague and embarrassing. However, as the authorities cited above show, the complaint must go to the root of the cause of action and, the excipient must be prejudiced in pleading thereto. Mere contradiction does not in and of itself amount to a vague and embarrassing pleading. The other offending features must also exist before an exception on this ground should be upheld.

[24] The defendants urged the court to find that the email contained inadmissible evidence. If I were to do so, the email would be disregarded and the entire basis for the exception would fall away as there would be no contradiction between the allegations pleaded and the email – the content of the email would have to be disregarded on this approach.

[25] I hold the view that it is not necessary for this court to make a ruling on the admissibility of the content of the email in this matter, nor that it is advisable, generally, to make rulings on the admissibility of evidence at the exception stage, which rulings might bind the trial court. The reason why it is not necessary in this instance to make a ruling is because, whatever I find in respect of admissibility, can have no bearing on the fact that the offending paragraphs are not relevant to an adjudication of the facts which are to be proven by the first plaintiff. A contradiction between an annexure and an irrelevant paragraph in a set of particulars of claim by definition does not go to the root of the cause

of action. The paragraph, being irrelevant, forms no part of the cause of action. Therefore, however much it may be contradicted by the annexure at least one essential leg of the test for excipiability on the vague and embarrassing ground is absent.

[26] Mr Pye, representing the first plaintiff argued that the contradiction, insofar as it exists, can not be found to be prejudicial to the defendants and that a plea to the offending paragraphs could easily be drafted. Indeed, to demonstrate the point, he had done so during the time of Mr Chohan's address to this court. It read as follows:

26.1. *The defendants deny having repudiated the claim.*

26.2. *The defendants deny that the email evidences the repudiation alleged.*

26.3. *The defendants deny that the email contains admissible evidence of a repudiation.*

[27] Neither Mr Chohan or I had the opportunity to properly consider and debate the proposed plea but it does *prima facie*, demonstrate that there appears to be little or no prejudice to the defendants in pleading to the offending paragraphs. Having to plead to irrelevant matter may be tiresome, but it does not mean an exception must be upheld.

[28] The acid test though is this: If the defendants admitted the allegations, would it make a difference to the outcome of the trial? Clearly not. The averments are irrelevant and probably should not have been pleaded at all. In these circumstances it can not be said that the vagueness and embarrassment (insofar as it is found to exist) goes " *to the whole cause of action* "[11]

[29] For purposes of this hearing I have assumed without finding:

29.1. That the email contains inadmissible evidence; and

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11 See footnote 7

29.2. That a contradiction exists between the email and the offending paragraphs.

[30] As stated, a finding that the email contains inadmissible evidence erodes the very basis of the exception as no contradiction can then be found to exist if the evidence is to be disregarded. Be that as it may, a finding that a contradiction exists between the email and the offending paragraphs does not lead to the conclusion that the defendants are prejudiced in pleading thereto. When a factual analysis is undertaken as was done, there can be no question of prejudice to the defendants if the allegations relating to the claim having been repudiated are not expunged on exception.

[31] I accordingly make the following order : The exception is dismissed with costs.

I Opperman
Acting Judge of the High Court

Heard: 23 October 2015
Judgment delivered: 27 October 2015

Appearances:

For Defendants: Adv MA Chohan SC
Attorneys: Norton Rose Fulbright South Africa

For Plaintiffs: Adv W Pye
Attorneys: Fasken Martineau