IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 20194/2014

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

In the matter between:

PENHELIG PROPRIETARY LIMITED **PLAINTIFF**

and

TONI ROBINSON COLLECTION CC T/A

COTTONWOOD TRADING **DEFENDANT**

JUDGMENT

OPPERMAN AJ

Introduction

[1] The Defendant has taken exception to the Plaintiff's particulars of claim as amended, which exception consists of 22 grounds taken as to vagueness and embarrassment, of which 16 of those, also contain alternative grounds based

on a failure to disclose a cause of action. At the outset, Mr Dobie, appearing on behalf of the excipient (the defendant), advised that he was not arguing the second exception and was not persisting with the twentieth exception.

[2] The Plaintiff's claim is for various heads of damages for the breach of a commercial written lease agreement of immovable property ('*the lease agreement*').

[3] I will deal with each exception in turn. Prior to doing so, something about the law applicable to exceptions.

Exceptions – Vague and embarrassing

[4] 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]

[5] 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]

[6] 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*

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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

excipient can show is caused to him, in his efforts to plead to the offending paragraph, by the vagueness complained of".[4]

[7] 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]

[8] 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]

[9] 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*".

Exceptions : no cause of action

[10] As stated in *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-E:

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

"*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."*

[11] 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."*

[12] 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."*[9]

Exception 1 - No cause of action

[13] The Plaintiff claims damages under various heads. The Plaintiff in setting out its damages, annexed a number of invoices generated by itself in respect of the costs allegedly incurred. The Plaintiff included in such invoices, Value Added Tax at the rate of 14%. These invoices do not relate to services rendered by the Plaintiff for and on behalf of the Defendant, but to a quantification of the Plaintiff's damages. The Defendant contended that the Plaintiff's particulars of claim does not set out a cause of action in relation to the portion of the claim which includes Value Added Tax.

[9] 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.

[14] The total VAT amount claimed is R2088.07. This forms part of the water, electricity, garden clearance services and reconnection of electricity claim, the total claim of which is R17 165.84. In *Barrett v Rewi Buluwayo Development Syndicate Ltd* 1922 AD 457[10] the principle was formulated that "*Exception should not be taken to particular sections of a pleading, unless they are self-contained and amount in themselves to a separate defence as the case may be*". In *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A)[11] the principle was restated as follows: "*It seems that the function of a well-founded exception that a plea, or part thereof, does not disclose a defence to the plaintiff's cause of action is to dispose of the case in whole or in part. It is for this reason that exception cannot be taken to part of a plea unless it is self-contained, amounts to a separate defence, and can therefore be struck out without affecting the remainder of the plea.*"

[15] It seems to me that the VAT portion is so closely tied up in the balance of the claim that to excise it would offend the above criteria.

[16] Moreover, in *Terminus Centre CC v Henry Mansell (Pty) Ltd* 2006 JDR 0047 (C)[12], at 29 it was held that whether the plaintiff is liable to pay VAT is a matter between it and the South African Revenue Services. The Defendant can raise as a defence that VAT is not payable. This claim constitutes a very small portion under this rubric and it can hardly be contended that it disposes of the case in whole or in part. This ground of exception is thus dismissed.

[10] *Barrett v Rewi Bulawayo Development Syndicate Ltd* 1922 AD 457 at 458-459
[11] *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A)at 553F-G
[12] *Terminus Centre CC v Henry Mansell* (Pty) Ltd 2006 JDR 0047 (C)atp27-37

Exception 3 – No cause of action alternatively vague and embarrassing

[17] The Plaintiff in paragraph 8.1 of its Particulars of Claim indicates that the Defendant unilaterally, wrongfully and defectively cancelled the lease agreement by virtue of a letter dated 4 July 2013. The Plaintiff annexed a copy of such letter which letter made reference to a letter dated 21 January 2013 setting out the Plaintiff's alleged breaches. The Defendant argued that the Plaintiff's allegation that the Defendant wrongfully and defectively cancelled the lease agreement is based upon a conclusion of law, which conclusion has regard to an interpretation of the letter attached dated 4 July 2013 as read with the letter referred to therein. As the breach letter (the one dated 21 January 2013) is not annexed to the Plaintiff's particulars of claim, the Defendant is unable to ascertain the truth, veracity and/or accuracy of the Plaintiff's allegations as set out in paragraph 8.1. The Plaintiff's particulars of claim are, so the argument ran, accordingly vague and embarrassing insofar as the Defendant is unable to ascertain: 1) whether the cancellation was wrongful or defective in any way whatsoever; 2) the correctness of the allegations set out in paragraph 8.1; and 3) whether the Plaintiff has any basis for its claim set out in the particulars of claim. Alternatively, it was argued that the Plaintiff's particulars of claim sets out no cause of action insofar as the Plaintiff failed to allege on what basis in fact or in law the alleged cancellation was defective and/or wrongful, which is the entire premise of the Plaintiff's claims in its particulars of claim.

[18] The Plaintiff argued that the Defendant was under a misapprehension as to the basis on which the Plaintiff relied for the breach of the lease agreement by the

Defendant. It argued that the breach relied upon by it is not the conduct complained of in paragraph 8.1. It argued that the breach relied upon by it was the premature cancellation by the Defendant of the lease agreement, coupled with the failure by the Defendant to secure an alternative tenant.

[19] Paragraph 8.1 is preceded by the following introductory paragraph:

'*8. Notwithstanding the compliance by the Plaintiff with the terms and conditions of the Lease Agreement, the Defendant had breached the Lease Agreement, by inter alia:'*.

[20] If paragraph 8.1 is not intended to contain a breach relied upon by the Plaintiff then it should not form part of paragraph 8. If it is intended to contain a breach, the breach/es should be pleaded with clarity and it should not be for the Defendant to analyse the annexures to the particulars of claim so as to identify the factual basis for the conclusions of law pleaded in paragraph 8.1. The Defendant is embarrassed as the Defendant cannot ascertain the facts relied upon, from the pleading. The Defendant is accordingly prejudiced in pleading thereto. I thus find that the allegations pleaded in paragraph 8.1 are vague and embarrassing to the extent referred to herein.

Exception 4 – vague and embarrassing

[21] The Plaintiff in paragraph 8.2 makes reference to fictitious and fabricated breaches raised by the Defendant. The Defendant contends that such allegations are conclusions of law and the failure by the Plaintiff to have pleaded the facts underpinning such conclusions renders the particulars of claim vague and embarrassing. The arguments raised in respect of this paragraph are similar to those raised in respect of paragraph 8.1 of the

particulars of claim. The Defendant contended that the Plaintiff is obliged to plead why it contends the breaches raised by the Defendant were fictitious and fabricated. Had the breaches in paragraph 8.1 been identified, this paragraph might have followed. The Plaintiff has pleaded that the alleged breaches (whatever they are) were fictitious and fabricated. These two paragraphs are so closely interlinked, that they should stand or fall by the same sword. The Defendant is embarrassed as the Defendant cannot ascertain the facts relied upon, from the pleading and is prejudiced in pleading thereto. I find that the allegations pleaded in paragraph 8.2 are vague and embarrassing to the extent referred to herein.

Exception 5 – vague and embarrassing

[22] The Plaintiff in paragraph 8.3 makes reference to clause 3 of the lease agreement and alleges that the Defendant was responsible to find a suitable replacement tenant in the event of cancellation. The Defendant contends that clause 3 of the lease agreement relates to consensual cancellation whilst the Plaintiff alleges that the Defendant cancelled the agreement of lease based upon alleged breaches by the Defendant. The Defendant thus contends that the Plaintiff's particulars of claim are vague and embarrassing insofar as the Defendant is unable to ascertain on what basis or grounds clause 3 of the agreement is applicable.

[23] Paragraph 8.3 follows upon the already quoted introductory paragraph. It therefore reads as follows:

'8. *Notwithstanding the compliance by the Plaintiff with the terms and conditions of the Lease Agreement, the Defendant had breached the Lease Agreement, by inter*

alia:……8.3 It was expressly agreed, in clause 3 of the Lease Agreement, that should the Defendant wish to terminate the Lease Agreement before the Initial Period, the Defendant would be responsible for finding a suitable replacement tenant at the value of the lease contract;'

[24] It would seem that what the Plaintiff intended to plead was to allege that the Defendant breached the lease agreement by failing to find a suitable replacement tenant. Defendant has couched its exception on the basis that this is indeed what was pleaded. Its argument, as I understand it, is that there can be no such breach as the agreement does not oblige the Defendant to find a suitable replacement tenant other than in the event of a consensual cancellation.

[25] Clause 3 reads as follows:

'***TERMINATION OF LEASE****. Should either party to this agreement wish to terminate after the expiration of this Lease, he shall give two clear calendar months notice to do so. If tenant wishes to terminate lease before it expires, he is responsible to find a suitable replacement tenant at the value of the lease contract.'*

[26] The Plaintiff argued that the issue raised by the Defendant as to Clause 3 is a matter of interpretation of the contract. The principle is that it is not only the language of the provision but also the purpose to which such provision was directed and the material known to those responsible for its production relying in this regard on the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 2012 (4) SA 593 (SCA) at 602I to 605B. It was argued that this feature could only be considered after the production of evidence at trial but that in any event, the mere language of the provision, in the context of the document, did not establish the interpretation contended for by the Defendant. In my view, one of the interpretations to be afforded to the last sentence of

clause 3, is that in the event of a consensual cancellation of the lease agreement, the Defendant would be obliged to find a suitable replacement tenant. The other interpretation is that if the tenant wished to cancel the lease agreement for whatever reason ie with the consent of the Plaintiff or without such consent, it was obliged to find a suitable replacement tenant.

[27] In my view, paragraph 8.3 is excipiable as the facts have not been properly pleaded. It does not read intellegibly as demonstrated in paragraph 23 hereof. However, the Defendant did not take the exception on this basis. It assumed that the Plaintiff had pleaded that the lease agreement had obliged the Defendant to find a suitable replacement tenant under circumstances where the Plaintiff had contended that Defendant had breached the agreement. At this stage, and without the benefit of evidence and being confined to interpreting the pleadings read with the lease agreement, it would appear that such a construction is consistent with the provisions of clause 3. There is no contradiction between that which has been pleaded and the provisions of clause 3. This ground of exception is accordingly dismissed.

Exception 6 – No cause of action alternatively vague and embarrassing

[28] The exception initially taken was changed during argument. It was argued that the Plaintiff's particulars of claim was excipiable as in paragraph 6 it had alleged that it had complied with all its obligations in terms of the Lease Agreement in one single day. This allegation contradicted the obligations in the lease agreement that numerous obligations had to be performed which could

not possibly all have occurred on one day, the particulars of claim were accordingly vague and embarrassing.

[29] Paragraph 6 is introduced with the words: '*On or about'*. This implies more than one day. The Plaintiff pleaded that it had complied with it's obligations. It did so in paragraph 6 and again in paragraph 9. The Defendant could request particulars as to the facts underpinning these propositions. I find that sufficient facts have been pleaded and that this ground of exception is without merit and falls to be dismissed.

Exception 7 – No cause of action alternatively vague and embarrassing

[30] The next cause of complaint appears from that which the Plaintiff pleaded in paragraphs 9.1 and 9.2 of its Particulars of Claim: it claims for consumption charges for the period 6 September to 8 October 2013 however alleges that the Defendant vacated the premises on 30 September 2013. The Defendant in terms of the provisions of the lease agreement is liable only for such water and electricity actually consumed during the period of tenancy. The Plaintiff is accordingly claiming from the Defendant consumption charges for a period during which the Defendant was not in occupation of the premises and did not consume anything on the premises. The Defendant contends that the Plaintiff's particulars of claim are vague and embarrassing insofar as the Defendant is unable to ascertain whether the Plaintiff alleges that the Defendant continued to utilise services after vacating the premises, on what basis the Defendant is allegedly liable for such charges for the period 1 October to 8 October 2013, what portion of the alleged charges relates to the period whilst the Defendant

was in occupation and what portion relates to the period thereafter. In the alternative, Defendant contended that the Plaintiff's particulars of claim sets out no cause of action in respect of water and electricity consumption for the period 1 October to 8 October 2013.

[31] In my view, such claim relates to the period of measurement by the relevant municipality being between 6 September 2013 and 8 October 2013. How much was consumed by the Defendant is a matter for evidence and/or particulars can be requested. It is further not alleged that there was actual consumption between 1 October 2013 and 8 October 2013. In paragraph 13 it is pleaded that such premises was only occupied again on 1 April 2014. Reading the pleading as a whole, it is clear that what is alleged, is that the Defendant is held liable for it's consumption until 30 September, when it vacated the premises. The Plaintiff will have to lead evidence at the trial as to whether or not charges were levied beyond 30 September or whether the date of 8 October is merely a standard cut off point for billing purposes. This ground of exception is accordingly dismissed.

Exception 8 – No cause of action alternatively vague and embarrassing

[32] The Plaintiff in paragraph 9.3 alleges that the Defendant refused and failed to make payment of outstanding charges for garden and clearance services in the sum of R2 080,50. The Defendant contended that the Plaintiff did not allege on what basis the Defendant is liable for such charges. In terms of the provisions of the agreement of lease, the Defendant could make use of the Plaintiff's garden services, however, it has not been alleged that the Defendant chose to

do so. Such services allegedly related to Annexure "POC7" which was issued on 13 February 2013. Defendant contended that the Plaintiff's particulars of claim are vague and embarrassing insofar as the Defendant is unable to ascertain whether the amount is an agreed amount, whether the amount relates to damages suffered, whether the charges were incurred by the Plaintiff in accordance with some external agreement and on what basis the Plaintiff claims such amounts. In the alternative Defendant contends that the Plaintiff's Particulars of Claim sets out no cause of action.

[33] The Plaintiff pleads in paragraph 9.3 that the "*…charges for garden clearance services…*" is "*…in respect of care and maintenance of the garden…*". Plaintiff argued that clause 6 of the Lease Agreement specifically provides that the Lessee (being the Defendant) would be responsible for the care and maintenance of the garden and grounds, and logically such included the costs pertaining to such care and maintenance.

[34] In my view, the Plaintiff has not set out a basis for this claim. The lease agreement creates an obligation to be responsible for the care and maintenance of the garden and grounds. A breach of this obligation may result in a claim for damages. However, there exists no obligation to pay for maintenance. I find that paragraph 9.3 accordingly fails to disclose a cause of action and this ground of exception is upheld.

Exception 9 – No cause of action alternatively vague and embarrassing

[35] The Plaintiff in paragraph 9.4 alleges that as a result of the Defendant's failure to pay for electricity supply, the electricity supply was terminated. The

Defendant argued that the Plaintiff did not allege to whom the Defendant was to make payment and insofar as it was alleged that the payment was to be made to a third party, the Plaintiff failed to set out on what basis it was entitled to claim the consumption charges as is set out in paragraph 9.2 of the Particulars of Claim, from the Defendant. It also pointed out that insofar as it was terminated, such termination occurred subsequent to the Defendant vacating the premises. The Defendant argued that the Plaintiff's claim amounted to special damages which do not flow naturally from the breach nor does the Plaintiff state that the damages were within the contemplation of the parties at the time the agreement was entered into.

[36] The Plaintiff has not set out a basis for this claim. The lease agreement creates an obligation to pay for electricity consumption. However, what the Plaintiff seeks to claim in this instance, is a reconnection fee due to the Defendant's failure to pay for it's electricity consumption. The current claim appears to be for special damages for which no factual basis has been pleaded. I accordingly find that paragraph 9.4 fails to disclose a cause of action and this ground of exception is thus upheld.

Exception 10 – 17 – No cause of action alternatively vague and embarrassing

[37] The Plaintiff in paragraph 12.1 claims that the Defendant failed to keep the premises in a reasonable state of repair and failed to return same in a reasonable condition, less reasonable wear and tear. The Defendant points out that the amounts claimed in the sub-headings to paragraph 12.1 do not relate to reasonable wear and tear particularly paragraphs 12.1.1.12 to

12.1.1.31. The Defendant argued that it is unable to ascertain on what basis these amounts are claimed by the Plaintiff insofar as they do not relate to contractual obligations of the Defendant and no other basis for claiming same has been set out. Paragraph 12.1.1, which is the introductory paragraph for, amongst other paragraphs, paragraph 12.1.1.12 to 12.1.1.31 reads:

'*Failure to maintain the interior of the premises, and garden and grounds, requiring the Plaintiff to re-paint and repair the interior of the premises, and repair the garden and grounds, and as such the Plaintiff incurred the following* ***costs*** *in this regard:' (own emphasis)*

[38] The Plaintiff is not claiming, in what follows upon paragraph 12.1.1, that such costs relate to *'reasonable wear and te*ar'. It is relying on the contractual obligations contained in clause 6 of the lease agreement and pleaded in paragraph 12.1.1. Further, the pleading needs to be read as one composite document. Between paragraphs 10 and 11 appears a heading: '**DAMAGES**'. Paragraph 11 then explains that pursuant to the Defendant's unilateral and wrongful cancellation of the lease, Plaintiff set out to mitigate its damages.

[39] The Defendant contends that the claims that follow are evidently not maintenance claims but damages claims. On a reading of the pleading as a whole and having regard to, amongst other things, the heading appearing between paragraphs 10 and 11, and the introductory paragraph quoted in paragraph 29 hereof, it is evident that the Plaintiff is in fact claiming damages. I thus find that a proper reading of the pleading does not lead one to conclude that the Plaintiff is seeking to enforce contractual obligations. It is claiming damages flowing from the Defendant's failure to comply with it's

contractual obligations and the actual costs incurred as a result thereof. These grounds of exception are accordingly dismissed.

Exception 18 – No cause of action alternatively vague and embarrassing

[40] The Plaintiff in paragraph 12.2 alleges that it has suffered damages in the sum of R246 938,37. The Plaintiff furthermore alleges that the Defendant has made payment of the deposit of R80 000. It then sets off the one amount against the other. The Defendant objects to this contending that one cannot set off a liquidated amount against an unliquidated amount. This, as a general principal, is, of course, correct.

[41] This, however, does not render the particulars of claim excipiable. The Plaintiff can claim its full amount. The Defendant can counterclaim for its deposit. The Plaintiff can request the court to stay the counterclaim in anticipation of the illiquid claim becoming liquid upon judgment. The Defendant's complaint is effectively that the Plaintiff has claimed too little from the Defendant. It can plead this. This ground of exception is accordingly dismissed.

Exception 19 – No cause of action alternatively vague and embarrassing

[42] The Plaintiff in paragraph 13 alleges that it obtained a new tenant with effect from 1 April 2014. The Defendant contended that the Plaintiff did not allege what the rental was it obtained from such tenant, the exact terms and conditions, the period of the lease nor any other amounts it was entitled to claim from such tenant. The Defendant argued that it was unable to

ascertain the reasonableness of the damages claimed by the Plaintiff, whether the Plaintiff in fact suffered any damages, the validity of the Plaintiff's claim as against the Defendant in respect of loss of rental and/or costs incurred.

[43] Plaintiff's claims in respect of paragraphs 15.1 to 15.6 are claims not based on the new lease with the new tenant, but on the rental as per the Lease Agreement concluded with the Defendant for the months that the premises stood empty. The claim in paragraph 17 is for commission costs incurred due to the Plaintiff having to find an alternative tenant and paragraph 20 is for the costs of modification of the premises to meet the needs of the new tenant. These are all damages claims to which Defendant can request further particulars in due course. This ground of exception is dismissed.

Exception 21 – vague and embarrassing

[44] The Plaintiff in paragraph 14 alleges that it engaged the services of API Property Group CC. The Defendant argued that the Plaintiff does not allege when such services were engaged and, as a result, the Defendant is unable to ascertain whether the Plaintiff took reasonable steps to mitigate its damages, whether the Plaintiff took timeous steps to mitigate its damages and whether the amount of commission claimed is reasonable. It contends that having regard to the fact that the Plaintiff does not set out the basis upon which such commission has been ascertained or calculated, it is unable to assess whether such commission amounts to a market-related commission under the circumstances.

[45] The information lacking falls within the secondary evidence category which can either be requested after the close of pleadings, or evidence can be led on it ,at trial. In addition, the onus is on the Defendant to prove that the steps taken by the Plaintiff were not correct. Such allegations are to be raised in a plea[13]. The absence of this information does not render the pleading vague and embarrassing and this ground of exception is accordingly dismissed.

Exception 22 – No cause of action

[46] The Plaintiff in paragraph 17 claims for the costs incurred and the commission paid to an agency to obtain a replacement tenant. The Plaintiff in paragraph 20 claims amounts in respect of costs incurred to ensure that the property complied with the needs of a new tenant. The Defendant contends that the costs incurred in respect of a new tenant and the costs to restore the premises to an acceptable condition for the new tenant, are costs which the Plaintiff would in any event have had to incur once the lease had come to an end. Accordingly, so the argument goes, these amounts amount to special damages. The Defendant points out that the Plaintiff does not plead that the amounts flow naturally from the Defendant's breach nor that they fell within the contemplation of the parties when the lease agreement was entered into. The Defendant argued that the Plaintiff accordingly failed to set out a cause of action in respect of these damages.

[13] *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372 @388-389

[47] The Plaintiff has not dealt with the aspects highlighted by the Defendant, and no factual foundation has been pleaded which would sustain the claims under these rubrics. I accordingly uphold this ground of exception.

Conclusion

[48] I accordingly grant the following order:

48.1. The exception is upheld in respect of paragraphs 8.1, 8.2, 9.3, 9.4 and 17 of the Plaintiff's particulars of claim and those paragraphs are hereby struck out;

48.2. The Plaintiff is granted leave to amend its particulars of claim on or before 30 January 2016, if so advised.

48.3. The Plaintiff is to pay the costs of the exception.

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I OPPERMAN
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 22 October 2015
Judgment delivered: 18 December 2015
Appearances:
For Excipient/Defendant: Adv JG Dobie
Instructed by: Susan Cappilati Attorneys
For Respondent/Plaintiff: Adv GV Meijers
Instructed by: Marais Attorneys