



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: Electronic reporting only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

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DATE

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SIGNATURE

Case No. 2015/32685

In the matter between:

PARAMOUNT PROPERTY FUND LIMITED

Excipient

and

SEAN PETER HAUPT

Respondent

***Case Summary:* Practice – Pleadings – Exception to particulars of claim – whether pleading lacks averments which are necessary to sustain an action for damages resulting from a breach of contract – exception upheld.**

JUDGMENT

MEYER J

[1] This is an exception against a particulars of claim on the basis that the pleading lacks averments which are necessary to sustain an action for damages resulting from a breach of contract. The respondent, Mr Sean Peter Haupt, instituted an action against the excipient, Paramount Property Fund Ltd (Paramount), wherein it claims rectification of a written agreement concluded between the parties,

damages resulting from an alleged breach of the contract and, in the alternative, delictual damages based on an alleged fraud.

[2] It is trite that where the same claim is based on alternative causes of action, an exception can be taken against one or more of the alternatives. (See *Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC).) By the nature of exception proceedings, the correctness of the facts averred in the particulars of claim must be assumed (see for example *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 3-10; *Stewart & another v Botha & another* [2008] ZASCA 84; 2008 (6) SA 310 (SCA) para 4). The excipient has to show that the pleading is excipiable on every interpretation that can reasonably be attached to it. (See *Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk* 1988(2) SA 493(A) at 500 E-F.)

[3] Paramount let premises to a close corporation, Peter Robin Haupt (Nine) CC (the tenant). Because the tenant fell into arrears with the rentals that were payable in terms of the lease, Paramount issued a rent interdict summons out of the regional court, and the movable items found at the leased premises were attached. A sale in execution was scheduled but cancelled due to interpleader proceedings that had been instituted as a result of Mr Haupt claiming to be the owner of a number of the attached items.

[4] The interpleader proceedings were settled in terms of a written 'settlement agreement and payment arrangement' (the contract) that was concluded between Paramount and Mr Haupt. It is recorded in the contract, *inter alia* that:

- 'd. The Debtor [Mr Haupt] wishes to purchase all items on the premises, should it be sold by the Sheriff on a sale in execution. In an attempt to save legal costs and time the Debtor has offered to make payment for the attached goods and withdraw the interpleader summons; so that all goods can be removed from the premises and released from the attachment. The sheriff has been made aware of the arrangements and wishes between the parties as set out in the agreement.
- e. Ownership of the goods shall vest in the debtor once the last payment is made in respect of the goods purchased by the debtor.'

The contract then provides *inter alia* for the withdrawal of the interpleader proceedings (clause 1), payment of the purchase price (clauses 2 and 3) and that Mr

Haupt 'will remove the attached goods from the premises, within 21 days of payment for (*sic*) the amount referred to in 2'.

[5] In its particulars of claim Mr Haupt alleges the conclusion of the contract and he specifically pleads the essential terms of a contract of sale as agreed upon in terms of the contract: (a) that Paramount sells and that he buys, (b) 'all the attached goods' at the leased premises, (c) at a fixed price of R360 000 to be paid in two instalments of R100 000 and R260 000 each. In the alternative, he seeks rectification of the contract to provide that the goods sold were 'all the goods as attached by the sheriff and reflected in the inventory as drawn by the Sheriff of the Krugersdorp Magistrates' Court'.

[6] Of relevance here is Mr Haupt's further averments in paragraphs 5.9, 11 and 12 of the particulars of claim, which read thus:

'5.9 All the goods as attached by the sheriff and reflected in the inventory, as drawn by the Sheriff of the Krugersdorp Magistrates' Court, being a complete inventory of the attached goods . . . was (*sic*) still physically within the premises.

...

11. The Defendant breached the agreement in that at least 18 of the items reflected in the first inventory was no longer physically within the premises. Attached here and marked as Annexure "SP8" is a schedule depicting the 18 items ("the 18 items") with their respective fair and reasonable values (which collectively amounts to R1 568 512.89) that were reflected in the first inventory but which were no longer physically within the premises.
12. As a result of the Defendant's breach, the Plaintiff has suffered damages in an amount of R1 568 512,89 which is constituted by the fair and reasonable value of the 18 items.'

[7] Paramount contends that although Mr Haupt has pleaded that it breached the agreement 'in that at least 18 of the items . . . were no longer physically within the premises', he failed to plead any such contractual obligation on it. Mr Haupt, on the other hand, argues that the contractual obligation that was breached is set out in clause 5.9 of the particulars of claim.

[8] Mr Haupt's contractual claim is not for the return of a proportionate part of the price agreed as a result of a material deficiency in the quantity of the goods sold to him. In *Welgemoed en Andere v Sauer* 1974 (4) SA 1 (A) it was decided that '[t]he

legal effect of both a sale by measure (*ad quantitatem*) and a sale by the piece (*ad corpus*) is that the purchase price is adjusted *pro rata* in proportion to the excess or shortfall in the property sold unless the contract otherwise provides. In sales by measure the adjustment follows *normaliter*; if the sale is by piece it follows only if the deviation from the given measurement is sufficiently large’.

[9] Mr Haupt’s contractual claim is also not founded upon a breach of warranty. Instead, he claims damages for loss sustained (the fair and reasonable value) by reason of ‘at least 18 of the items reflected in the first inventory was no longer physically within the premises’. But Mr Haupt does not allege any contractual obligation on the part of Paramount to ensure that the 18 items remained within the premises until they were removed by him. Clause 5.8 of the particulars of claim is a mere recordal that all the goods attached by the sheriff and reflected in the inventory were still inside the premises presumably on the date of the conclusion of the contract, or, at best for Mr Haupt, perhaps a warranty by Paramount to that effect. That averment, however, does not amount to a contractual obligation on the part of Paramount to ensure that the goods remain inside the premises between the date of the conclusion of the contract and the date when Mr Haupt took delivery thereof. The particulars of claim, therefore, lack averments which are necessary to sustain a cause of action for damages resulting from a breach of contract.

[10] In the result the following order is made:

- (a) The exception that the particulars of claim lack averments which are necessary to sustain a cause of action for damages resulting from a breach of contract is upheld with costs.
- (b) The respondent (plaintiff) is given leave to amend the particulars of claim within a period of 15 days from the date of this order.

P.A. MEYER
JUDGE OF THE HIGH COURT

Dates of hearing:	4 December 2018
Date of Judgment:	27 February 2019
Counsel for Excipient:	Adv BH Steyn
Instructed by:	SSLR Inc., Johannesburg
Counsel for Respondent:	Adv AJ Venter

Instructed by:

Symes Inc., Kilarney, Johannesburg