REPUBLIC OF SOUTH AFRICA

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

CASE NO: 38061/18

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

12/12/2019
DATE

SIGNATURE

In the matter between:

VODACOM (PTY) LIMITED Applicant/Excipient

and

CEZ INVESTMENTS (PTY) LIMITED Respondent

In re:

CEZ INVESTMENTS (PTY) LIMITED Plaintiff

and

VODACOM (PTY) LIMITED Defendant

JUDGEMENT

CARSTENSEN AJ:

[1] The plaintiff issued summons claiming, in Claim A, payment of rental

and related charges in the amount of R109 344.31 and in Claim B, the amount of R11 938 392.00 in respect of damages as a consequence of a breach of an alleged duty of care in terms of which the defendant acted negligently.

[2] The defendant issued a notice in terms of uniform rule 23(1) and 30(2) on 11 December 2018 to which there was no response and this exception was then filed by the defendant on 18 February 2019.

[3] Thereafter the plaintiff filed its first notice in terms of uniform rule 28 on 15 May 2019 to which the defendant filed the first notice of objection in terms of rule 28(3) on 29 May 2019.

[4] The plaintiff then filed a second notice in terms of uniform rule 28 on 12 June 2019 and the defendant responded with a further notice in terms of rule 28(3) on 19 June 2019.

[5] The plaintiff, represented by Mr GM Young argued, as a point *in limine,* that the exception was irregular and/or should not be entertained as it was launched "in the face" of an application for amendment. However the exception was filed even before the first notice of intention to amend.

[6] The plaintiff also argued that the proper procedure would have been to allow the amendment to go through and then except to the amended particulars of claim.

[7] However, the proposed amendment does not resolve all of the

complaints and the exception was to the original particulars of claim, not to the amended particulars of claim. In any event, the amendment had not, at the date of argument, been effected and, due to the objection, may or may not be granted. In addition, the arguments raised *in limine* could also be advanced during the argument on the exception as to why the exception should not be granted. Consequently I dismissed the point *in limine*.

[8] In respect of the merits, it was pointed out by counsel for the excipient, Mr N Luthuli, that there was no exception to claim A and that the exception was focussed on claim B which the excipient considered to be an entirely new cause of action. There are four grounds of exception raised.

[9] The first ground of exception is that it was not clear whether the plaintiff's claim B was based on the lease agreement or on a "new contract", as it appeared from paragraph 14 of the particulars of claim that a separate contract was relied upon distinct from the lease agreement. To the extent that the plaintiff relied on a new contract the plaintiff, (so the excipient contended), had failed to comply with uniform rule 18(4) in that it had failed to set out the material facts upon which it relied for claim B and did not state whether the new contract was written or oral and consequently claim B was vague and embarrassing and did not disclose a cause of action.

[10] The excipient also pointed out inconsistencies in the use of the words:

"property", "buildings" and "premise" in the particulars of claim.

[11] In dealing with this ground of exception:

[11.1] The particulars of claim record that the lease expired by effluxion of time on 1 June 2016, but notwithstanding that the defendant remained in occupation until 30 September 2017 so that it could reinstate the premises.

[11.2] The lease in fact provided that in the event that the defendant remained in occupation of the premises after the expiry of the lease, then the defendant's occupation would be on a monthly basis subject to a 10% increase in the gross monthly rental.

[11.3] During a period, described as the "reinstatement" in the particulars, it is pleaded, that:

[11.3.1] the plaintiff gave the defendant exclusive access and control over the property and the building (not merely the premises) so that the defendant could remove its installations, electrical cabling and generators;

[11.3.2] during that time, whilst the property and building were under the supervision and control of the defendant, the property and building were damaged as a result of the defendant's

negligence and/or failure to adhere to a duty of care which it owed the plaintiff and, as a result, the plaintiff was not able to re-let the property; and

[11.3.3] the fair, reasonable and market related costs of the repairs amounted to R1 729 100.00, the costs of procuring a temporary electricity connection was R48 100.00 and the loss of income was R10 161 192.00. In the circumstances, the plaintiff claimed the amount of R11 938 329.00.

[12] I am of the view that there is no merit in this ground of exception.

[12.1] It is clear that the lease anticipated in clause 3 that there could be a period of occupation subsequent to the expiry of the lease.

[12.2] The particulars state that during that period the purpose of the defendant remaining in occupation was so that it could reinstate the premises.

[12.3] It is however clear that the claim under claim B is delictual in nature insofar as it is a claim for damages caused as a result of the defendant's negligence or acts of the defendant's employees, to the "property" and "buildings" as

defined and as opposed to the "premises".

[12.4] It is clear that the words "premises", "property" and "buildings" are those as defined in the lease agreement and it is for this purpose that the words are used with capital letters.

[13] In respect of the second ground of exception, this again relates to the issue as to whether claim B is contractual or delictual in nature. As set out above, it is clear in my view that claim B is delictual. There was thus no need to plead the terms of any new contract. I am of the view that there is sufficient particularity is pleaded to enable the defendant to plead and a cause of action is disclosed. Consequently I cannot uphold the second ground of exception.

[14] The third ground of complaint is essentially that the particulars of claim do not set out the damages in a manner that will enable the defendant to reasonably assess nature of the damage or the cost of repairs as required in terms of rule 18(10). The particulars simply state that the fair, reasonable and market related costs to repair the damage amounts to R1 729 100.00. There is in fact a report attached to the particulars of claim as POC3. However the "report" is not of such a nature as to allow the reader to easily ascertain, in respect of each item, what the damage was, what was repaired or what the cost of repairing such item was. In fact, it is clear that some of the items listed relate to damage, i.e. paragraph 1.1 *"wiring burnt"* and items listed

arrear to be repairs, i.e. paragraph 1.2 *"rewire DB board"*.

[15] It is indeed not a *report* at all, but a *list of items* with no indication (or sufficient detail) as to the nature of the damage or the cost to repair but rather a single total amount is provided. In my view the particulars do not set out the damages in a manner that will enable the defendant to reasonably assess the quantum as required by rule 18(10) and consequently this complaint is well founded.

[16] The fourth ground of complaint is that the plaintiff claims damages, being loss of income in the amount of R10 161 192.00 for a period of 24 months.

[17] It is clear that the amount of R10 161 192.00 is for loss of income over a period of 24 months, thus for the rental which the plaintiff would have earned over that period. In the amended particulars of claim the plaintiff intends to add the phrase *"the aforesaid sum of R10 161 192.00 is the market related rental that the plaintiff would have earned over a 24 month period had the property not been rendered untenable"*. I think these words do not add anything to the present debate. In addition, the particulars of claim must be read as a whole and the plaintiff does plead that the plaintiff was not able to re-let the property and/or building due to the fact that there was no power supply to the buildings and the buildings were not in a tenantable condition. In the result, I do not believe that this complaint is well-founded.

[18] I add that there was an objection to the manner in which the exception was taken in that it combined uniform rule 30 and uniform rule 23. There is a clear distinction between rule 23 and rule 30, as explained in Jowell v Bramwell-Jones[1]:

> *"An exception that the pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the cause of the action as pleaded, whereas (b) rule 30 may invoked to strike out a claim pleaded when the individual averments do not contain sufficient particularity; it is not necessary that the failure to plead material facts goes to the root of the cause of action."*

[19] However I have no difficulty with the combined approach adopted and indeed the so-called *"two in one"* procedure has been approved by the courts, for example in Persons Listed in Schedule A to the Particulars of Claim v Discovery Health[2]. In addition, in coming to the aforesaid finding I bear in mind that a court should not look over critically at the pleading.[3]

[20] In the result, the first, second and fourth grounds of exception are to be dismissed. However the defendant's third complaint is to be upheld to the extent that the particulars of claim do not set out the damages in a manner that will enable the defendant to reasonably assess the

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1 1998 (1) SA 836 (W) at 902F-G
2 [2009] 2 All SA 479 (T) at para [6]
3 First National Bank of Southern Africa Ltd v Perry NO 2001 (3) SA 960 (SCA) at 972I

quantum as required by rule 18(10). However, I am of the view that the plaintiff is entitled to an opportunity to amend the particulars of claim in respect of this claim.

ORDER

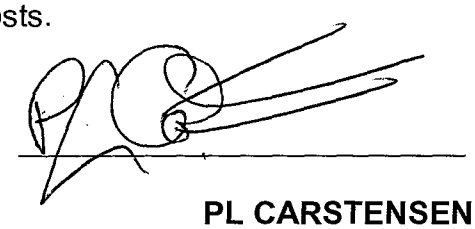
[21] In the result, I make the following order:

[21.1] the first, second and fourth grounds of exception are dismissed;

[21.2] the third exception is thus upheld and in terms of the provisions of uniform rules 18(10), read with 18(12) and 30, the plaintiff's particulars of claim in in respect of the claim for R1 729 100.00, excluding VAT, being the cost of repairing damage to the property, is set aside in terms of the provisions of uniform rule 30(3);

[21.3] the plaintiff is granted an opportunity to amend the particulars of claim within 20 days from date of this order;

[21.4] no order is made as to costs.



PL CARSTENSEN
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

DATE OF HEARING: 4 September 2019
DATE OF JUDGEMENT: 12 DECEMBER 2019

APPEARANCES:

COUNSEL FOR PLAINTIFF: ADV GM YOUNG

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COUNSEL FOR RESPONDENT: ADV N LUTHULI

INSTRUCTED BY: FARAH & PARTNERS