REPUBLIC OF SOUTH AFRICA

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

Case No: 18241/2018

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

11/3/2019

SIGNATURE DATE

In the matter between:

VODACOM (PTY) LTD Excipient/Defendant

And

GM GRAPHIX (PTY) LTD Plaintiff/Respondent

JUDGMENT

INTRODUCTION

[1]. This is an exception in terms of Rule 23(1) of the Uniform Rules of Court in terms of which the Defendant excerpts to the Plaintiff's particulars of claim as amended on the basis that the said particulars of claim are vague and embarrassing.

[2]. In its amended particulars of claim, the Plaintiff averred that since 2008 the Defendant rendered services to it under the account number SM000448 ("the SM account"). From this service, it received airtime, on a monthly basis, on two sim cards which were linked to its switchboard. It paid for the said services by way of a debit order activated against its Nedbank Business Account.

[3]. On about 2012, an employee of Vodacom Loftus Shop approached the Plaintiff and proposed to offer the Plaintiff package/services that were of a better value than what the Plaintiff received under the SM account. Plaintiff was interested in the new offer, it accepted the offer, and concluded a new contract with the Defendant (not with Vodacom Loftus Shop). The agreement resulted in the conclusion of the creation of account number B007055 ("the B0 account").

[4]. The Plaintiff avers that the contract concluded thereunder was between the Plaintiff and Defendant, with the Defendant being responsible for, *inter alia,* rendering services to the Plainitff and billing the Plaintiff for those services.

[5]. The Plaintiff avers further that "An employee of Vodacom Shop Loftus, JACO COETZEE, who at all material times represented the Defendant, undertook to close the SM account and cancel all contracts thereunder as the same

services, specifically the supply of airtime for the Plaintiff's switchboard, would be rendered under the B0 account."

[6]. Further, "in January 2013 employees of the Vodacom Shop Loftus whilst acting in the course and scope of their employment with Vodacom Shop Loftus and who at all material times represented the Defendant, removed the two existing sim cards that were linked to the SM account from the premises of the Plaintiff and replaced these with new sim cards, which new sim cards also had new cell phone numbers that were linked to the B0 account."

[7]. The Plaintiff avers that the Defendant debited its SM account with an amount R3,267,18 and informed the Plaintiff that that was the last debit order for the SM account. Indeed, after 31 January 2013 the Plaintiff did not receive any invoices from the Defendant in respect of the SM account.

[8]. The Plaintiff contends that the employees of Vodacom shop Loftus did, at all material times, represented the Defendant. I understand this submission to be saying that these employees merely facilitated the conclusion of a contract.

[9]. My reading of the first part of the Plaintiff's particulars of claim suggesst to me that even though the Vodacom Shop Loftus employees acted within the scope and course of their employment with that Shop Loftus, they ostensibly represented the Defendant in that despite them doing all that was necessary to secure the contract from the Plaintiff, at the end of the day:

9.1. it was the Defendant who rendered the services under the SM account;

9.2. it was the Defendant who stopped rendering the services under SM account;

9.3. it was the Defendant who rendered the new services under the B0 account;

9.4. it was the Plaintiff whose account was billed, by the Defendant, for the services rendered under the B0 account.

[10]. The employees of Loftus Shop do not feature anywhere herein other than the initial interaction with the Plaintiff as set out in the particulars of claim.

[11]. It is on this basis that the Plaintiff avers that "the contracts concluded thereunder were between the Plaintiff and the Defendant." The Plaintiff's counsel at some stage contended that the names of these employees from Loftus Shop were, in the bigger scheme of things, irrelevant. I shall revert back to this contention later in this judgment.

[12]. In pleading omission by the Defendant in relation to the SM account (Claim 1), the Plaintiff avers that: Notwithstanding the fact that the Defendant informed the Plaintiff that the debit order which went off on 31 January 2013 would be the last debit for the SM account, the Defendant continued to debit the Plaintiff's bank account for the SM account on a monthly basis until 30 November 2016. The total amount debited is R145,858.00 (ONE HUNDRED AND FORTY FIVE THOUSAND EIGHT HUNDRED AND FITY RAND).

[13]. Accordingly, the Plaintiff avers that by virtue of public policy and/or legal policy considerations, the Defendant owed the Plaintiff, as a paying customer, a duty of care that it would not debit the account of the Plainitff without authorisation and would promptly resolve problems that the Plaintiff brought to its attention.

[14]. Plaintiff then sets out steps its employees and director took from 1 March 2013 in contacting the Defendant, via its call centre, in order to resolve the problem related to the continuing SM account debit order.

[15]. The Plaintiff avers that in November 2016, it was contacted by the Defendant and provided with a reference number and a centralised email address to which it had to send an email to the Defendant's for communication with the Defendant in relation to this debacle.

[16]. The Plaintiff avers that the Defendant advised it to send a request for the cancellation of the SM debit order on a signed company letter head. This, it did on 15 November 2016, and in which email it further demanded a refund of all the amounts debited from 1 February 2013.

[17]. The Plaintiff avers that the Defendant failed to discharge the duty of care it owed to the Plaintiff in that it failed to promptly and professionally attend to the Plaintiff's persistent complaints regarding the SM debit order, and neglecting to cancel the SM account debit order in January 2013.

[18]. The Plaintiff avers that the Defendant neglected and failed to close the SM account and cancel the contracts thereunder, as per the undertaking by JACO COETZEE, who it is alleged represented the Defendant notwithstanding the fact that the employees of the Vodacom Shop Loftus had removed the SM

account sim cards from its premises of the Plaintiff during the course and scope of their employment whilst representing the Defendant.

[19]. The Plaintiff avers that the Defendant further neglected and failed to adequately deal with, escalate and resolve the calls made by the Plaintiff to the call centre of the Defendant in order to have the SM debit order stopped.

[20]. The Plaintiff avers that the Defendant's failure to close the SM account and cancel the contracts thereunder in accordance with its undertaking resulted in the continuation of the SM account debit order after 1 February 2013. It avers that from 1 March 2013, the Defendant was aware of the unauthorised nature of the continued SM account debit order by virtue of the Plaintiff's regular and numerous calls to the Defendant's call centre.

[21]. Plaintiff avers, in conclusion, that "as a result of the Defendant's negligence the Plaintiff suffered the damages it set out in its particulars."

[22]. On about 27 August 2018, the Defendant filed a notice to remove a cause of complaint in terms of rule 23(1) of the Uniform Rules of Court on the basis that the Plaintiff's amended Particulars of Claim were vague and embarrassing, alternatively, do not contain the necessary averments to sustain a cause of action.

[23]. The Defendant complains that in paragraphs 5.5, 5.8, 5.9 and 8.1 of the amended Particulars of Claim, the Plaintiff makes reference to an employees of Vodacom Shop Loftus "who at all material times represented the Defendant" demonstrate that the for purposes of its claim, the Plaintiff relies on the alleged conduct of the employees of the Vodacom Shop Loftus.

[24]. For reasons contained hereinbelow, I disagree with the Defendant that this is the Plaintiff's reliance for its case.

[25]. The Plaintiff states that its claim is based solely on the Defendant's failure to stop the debit orders linked to the SM account. But the said conduct is preceded by the conduct of Jaco Coetzee who according to the Plaintiff undertook to close the SM account and cancel all the contracts thereunder, specifically the supply of airtime for the Plaintiff's switchboard. Although it is not pleaded whether or not the said Jaco failed, or succeeded in cancelling the said SM account, what is evident is that the Defendant, at some point, stopped rendering services to the Plaintiff under the SM account. This could explain the Plaintiff's contention that the said employee(s) of Loftus Shop had done all that they could and no negligence could be attributed to them.

[26]. From the narration of the papers, it is evident that at all times when the SM account was in place, and the debit orders were running on a monthly bases, the employees of the Vodacom Shop Loftus were not there. The debit orders were running against the Plaintiff based on the relationship it had with the Defendant. The Plaintiff's counsel argued that it could have been any employee from any franchise. I agree with that contention.

[27]. The Plaintiff avers that it was the failure, neglect by the Defendant in not stopping the debit orders that caused it the pure economic loss that it is claiming from the Defendant.

[28]. I am satisfied that the Plaintiff does not rely on vicarious liability of, or on the actions or omissions of, the employees of Loftus Vodacom Shop for the loss it

has suffered. I find that these employees were ultimately the links in a chain which resulted in the creation and termination of various accounts herein. They do not matter in the bigger scheme of events. The SM account was terminated and the B0 account created, despite the involvement of the said employees. The ultimate parties to any contract herein is and has always been the Plaintiff and the Defendant.

[29]. I am satisfied that the conduct of the employees at Loftus is irrelevant to the core of the Plaintiff's claim which is based on the Defendant's failure to stop debiting the Plaintiff's account.

[30]. It is evident from the Plaintiff's conduct in contacting the Defendant via call centre and centralised that the debit orders came to an end soon after the Defendant received the Plaintiff's email of 15 November 2016. Providing the Plaintiff with the centralised email address when it did, the Defendant facilitated the speedy resolution of the issue between the parties (the Defendant and the Plaintiff).

[31]. I am thus satisfied that the Defendant is able to plead to the particulars of claim as they stand.

[32]. The second ground of complaint is that the Plaintiff's claim is based on a breach of a duty of care that the Plainitff alleges the Defendant owed to it.

[33]. The complaint is that the Plaintiff has failed and/or neglected to establish and/or set out any basis whatsoever in its amended Particulars of Claim to support its reliance on a breach of a duty of care.

[34]. It is not clear in what way has the Plaintiff failed to set out the facts necessary to demonstrate the said breach of a duty of care and/or what those facts are.

[35]. Without delving too deep into the merits, I am satisfied, that if anything, this is clearly a defence that the Defendant ought to plead in its Plea. There is accordingly, no prejudice that the Defendant would suffer under these circumstances.

[36]. I now turn to the legal principles to determine circumstances under which exceptions can or cannot be granted. I do so herein below.

THE LAW ON VAGUE AND EMBARRASING PARTICULARS OF CLAIM

[37]. Rule 23 of the Uniform Rules of Court provides a defendant with an avenue of excepting to the plaintiffs' particulars of claim on two possible grounds. The first ground is where the pleadings are vague and embarrassing and the second ground is where the pleadings do not carry sufficient facts to sustain a cause of action.

[38]. A successful challenge of vague and embarrassing pleadings would result in the said pleadings having to be amended to provide particularity required by Rule 19. The case and the pleadings still remain extant as between the parties.

[39]. In support of the above, Olivier AJ ***in Giant Leap Workspace Specialists (Pty) Ltd v Scoin Trading (Pty) Ltd T/A The South African Gold Coin Exchange***[1], had the following to say:

"[32] An exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded. See Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 905 H-I. If the defendant knows which claim it must meet, the particulars of claim cannot be vague and embarrassing, and the exception cannot be upheld.

[33] This exception covers the instance where, although there is a cause of action, it is incomplete or defective in the way it is set out, resulting in embarrassment to the defendant. At issue is the formulation of the cause of action, not its validity. See Trope v South African Reserve Bank 1993 (3) SA 164 (A) at 269I.

[34] Herbstein & Van Winsen (636) says the following in respect of particularity, with reference to past case law:

> *It has been held that it is sufficient if a defendant knows 'adequately' what a plaintiff's case is or 'sufficiently' shows the defendant the case which he is called upon to meet."*

[1] Case No: 2014/37464.

RULES OF PLEADINGS (RULE 18)

[40]. The general rule relating to pleadings provides that the particulars of claim (statement of claim) must state in sufficient particularity the claim which Defendant must answer. In particular, rule 18(4) states that: *"every Pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defense or answer to any pleading as the case may be, with sufficient particularity to enable the opposite party to reply thereto."*

[41]. ***Shill v Milner 1937 AD 101***[2] took the point further in support of the above rule 18(4) where the Appellate Division expressed a word of caution to litigants that parties should not be encouraged to rely on the Court's readiness to consider and deal with unpleaded issues.

[42]. Rule 18(4) is interpreted and applied as requiring that a cause of action or defence must be contained in the pleading. The term "*cause of action*" was defined in ***Mckenzie v Farmers Co-operative Meat Industries Ltd*** as *"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the Court. It does not comprise every piece of evidence which is necessary to each fact, but every fact which is necessary to be proved."*

[2] At para 105.

[43]. It is trite law that Rule 18 of the Uniform Rules of Court deals with rules relating to pleadings generally. Rule 18 (4) requires that each pleading in an action shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim with sufficient particularity to enable the opposite party to reply thereto.

[44]. The material facts whereon a plaintiff relies should be concisely stated in his particulars of claim and these facts only, and no other should be pleaded.

[45]. The material facts do not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. *Facta probantia* has no place in pleadings.

[46]. A pleading should not contain matters irrelevant to the claim.

[47]. Pleadings that are a rambling preview of the evidence proposed to be adduced at the trial do not meet the requirements of Rule 18 (4) and would be excipiable as being vague and embarrassing.[3]

[48]. The plaintiff is certainly not entitled to plead a jumble of facts and force the defendant to sort them judiciously and fit them together in an attempt to determine the real basis of the claim.[4]

[49]. It is also trite law that for purposes of deciding an exception, the Court would

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[3] Moaki vs. Reckott 1968 (3) SA 98 AD at 102 A-B.
[4] Roberts Construction Ltd vs. Dominion Earthworks Ltd 1968 (3) 255 at 263.

consider the facts alleged in the pleadings as correct[5] unless they are palpably untrue or so improbable that they cannot be accepted.[6] This trite proposition cannot extend to assumptions or inferences.

[50]. The purpose of the exception procedure is *inter alia* to remove the need for guesswork.

[51]. The particulars of claim should be ***so phrased that a defendant is able to reasonably comprehend what case he is called upon to meet and reasonably and fairly able to plead thereto without embarrassment***. I shall advert to the aforegoing rule of law later on herein.

[52]. It may be possible to plead to particulars of claim by simply denying the allegations made, yet such a pleading would itself be expiable as being vague and embarrassing. Same would defeat the whole purpose of pleadings to wit to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed.

[53]. It is trite law that the true object of an exception is either, if possible, to settle the case, or at least part of it, in a cheap and easy fashion, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

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[5] Marney v Watson 1978 (4) SA 140 (C) at 144F-J (Coram Friendman J).
[6] Voget v Kleynhans 2003 (2) SA 148 (C) at 151G-H (Coram Van Reenen J).

[54]. It is further trite law that an exception that a pleading is vague or embarrassing will not be upheld unless the excipient **will be seriously prejudiced**.[7] I shall advert hereto later on.

[55]. The excipient has a duty to persuade the Court that the pleading is excipiable on any interpretation that can be attached to it.[8] The pleading must be looked at as a whole.[9]

[56]. An exception that the pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action**: it goes to the whole cause of action, which must be demonstrated to be vague and embarrassing.**[10] [Emphasis provided]

[57]. An exception that the pleading is vague and embarrassing **strikes at the formulation of the cause of action and not its legal validity.**[11] [Emphasis provided]

[58]. An exception that the pleading is vague and embarrassing will not be allowed **unless the excipient will be seriously prejudiced if the offending**

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[7] See also Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) AT 298A

[8] Frank v Premier Hangers CC 2008 (3) SA 595 (C) at 600F-G (per Griesel J). Picbel Groep Voorsorgfonds (in liquidation) v Somerville, and Related Matters 2013 (5) SA 496 (SCA) at 506E-I (Ponnan JA).

[9] Nel and Others NNO v MacArthur 2003 (4) SA 142 at 149F – H (per Basson J).

[10] See also Jowell v Bramnell Jones and Others 1998 (1) SA 836 (W) coram Heher J and confirmed in the Jowell v Bramwell-Jones and Others (543/97) [2000] ZASCA 16; 2000 (3) SA 274 (SCA); [2000] 2 All SA 161 (A) (28 March 2000).

[11] Trope v SARB 1993 (3) SA 264 (A) at 269I (per F H Grosskopf JA). See also Trobe v SARB and two Others 1992 (3) SA 208 (T) at 211B the decision of Kollapen J).

allegations were not expunged.[12] **The effect of this argument is that the exception can only be taken if the vagueness relates to the cause of action.**[13] [Emphasis provided]

[59]. The Court has to consider as a test for vagueness whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning. To put it at its simplest, a reader must be unable to distil from the statement a clear, single meaning.[14] In this case, the Defendant does not raise those complaints.

[60]. The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.[15] I note the lowering of the bar in terms of whether or not the prejudice must be serious or just any normal prejudice is required.

[61]. Finally, it is part of our law that a successful challenge of vague and embarrassing pleadings would result in the said pleadings having to be amended to provide particularity required by Rule 19. As I stated, the case and the pleadings between the parties still remain extant.

[62]. Armed with the above legal principles, I propose to approach the facts of this case and apply the aforegoing principles to the above facts. I am further minded, when reading on the basic principles governing an exception which

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[12] Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd 2014 (2) SA 157 (GNP) at 166G-H.
[13] Keely v Heller 1904 TS 101 at 103.
[14] Venter and Others NNO v Barrit; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) at 644B (per Potgieter AJ).
[15] Standard Bank of South Africa v Hunkydory Investments 194 (Pty) Ltd and Another (No 1) 2010 (1) SA 627 (C) at 630B (per Steyn AJ).

were summarised by Makgoka J in ***Living Hands (Pty) Ltd and Another v Ditz and Others,***[16] that "*(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.*"

[63]. I concur with the view expressed above by my learned Brother Makgoka J that a court should be able, where necessary, cut to the chase and to be practical about these matters, resolution of matters on technicalities only serves to delay the resolutions of disputes between the parties much to the unnecessary escalation of costs of dispensing justice.

[64]. I am also attuned to the legal proposition that the enquiry into whether or not a pleading is vague and embarrassing, involves first the question whether the pleadings lack particularity to the extent that it is vague and secondly, whether or not the alleged vagueness causes embarrassment of such a nature that the excipient is prejudiced.[17]

[65]. The excipient is correct that the evaluation of prejudice is a factual enquiry.

[66]. I thus also propose to approach the matter on the aforegoing basis.

APPLICATION OF THE LEGAL PRINCIPLES TO THE FACTS

[16] 2013 (2) SA 368 (GSJ).
[17] Trope v SARB 1993 (3) SA 264 (A).

[67]. In this matter, the Plaintiff divided its particulars of claim into a number of different headings from what it refers to as background facts, to grounds of liability under aquilian action.

[68]. It is evident from the perusal of the document and the background facts of this case that the employees of Vodacom Shop Loftus acted more like brokers for the Defendant going all out to secure clients for the Defendant and/or selling to existing Defendant's clients some favourable packages.

[69]. Plaintiff avers that once these middle persons secure such contracts, they fall off the radar and the Defendant becomes the party that renders the services and do the billing. The Plaintiff's counsel is correct that these employees do not represent any other service provider other than the Defendant.

[70]. It is therefor not assisting for the Defendant to contend that the claim formulated is of a vicarious liability when it is clearly not. As one carefully peruse those particulars, it is evident that the Plaintiff does not seek to impute any blame or liability on anyone of the Vodacom Shop Loftus employees. It is noteworthy that other than the brief interaction with Loftus employees, the contract is between the Defendant and the Plaintiff – not the Loftus Shop.

[71]. The source of the Plaintiff's claim against the Defendant has nothing to do with the conduct of these employees but has everything to do with that of the

Defendant. Plaintiff alleges that the Defendant's failure to stop the debit orders arising from the SM account is the cause of the loss it has suffered.

[72]. I accordingly find that the Defendant misdiagnosed the Plaintiff's case as a claim based on vicarious liability and thereafter sought to demand from the Defendant that it plead its case accordingly.

[73]. I find that the Defendant will not be prejudiced should the exception be dismissed or the paragraphs it complains about not be expunged. I find that the Defendant can plead to the case as formulated.

[74]. I also find that the Plaintiff's case is pleaded in such a manner that the Defendant can reasonably know what the Plaintiff's case is and what it is in for. It appears to me that the particulars of claim as pleaded, meet the requisite precision.

COSTS

[75]. Both parties sought to persuade me to award costs on a scale as between client and attorney. I asked the Defendant's counsel the basis therefor and she correctly could not find anything that warrants such punitive costs order.

[76]. The Plaintiff's counsel did not deal with the issue and I must confess, I also did not ask her.

[77]. I, in any event, do not see anything that warrants such cost order. Accordingly, I am inclined to award costs on a party and party scale.

CONCLUSION

[78]. For all of the above reasons, I come to the following conclusion:

1. The exception is dismissed;

2. The Defendant is ordered to pay the costs of this exception and to do so on a party and party scale.

I so Order.

T J MACHABA

Acting Judge

Gauteng Local Division

Johannesburg

Date of hearing: 28 February 2019

Date of Judgment: 12 March 2019

APPEARANCES:

For Plaintiff: Ms M Vermeulen (Attorney)

For Defendants: Adv. V. Vergano

Instructed by: Farah & Parker Attorneys