



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

CASE No: 26324/2019

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

SIGNATURE

15/12/2020
DATE

In the matter between:

YM STIGLINGH

1ST PLAINTIFF

MPL STIGLINGH

2ND PLAINTIFF

and

DEBT RESCUE

DEFENDANT

JUDGMENT

MAHOMED, AJ

THE FACTS

In this matter, the excipient/defendant excepts to the plaintiff's particulars of claim on the basis that "it lacks any discernible cause of action.". The excipient/defendant

excepted on eleven grounds of complaint in which it was alleged that the respondent/plaintiffs have not made out any cause of action for the “wide-spanning relief” that they seek against this defendant. Further the excipient/defendant alleges that the plaintiff has sued the wrong party.

The excipient/defendant prays for an order as follows:

1. The exception be upheld.
2. The particulars of claim be set aside.
3. Plaintiff pays costs of this exception.
4. Further and or alternate relief.

On the date of the hearing of this matter, Mr Coetsee for the respondent, conceded prayers 1, 2 and 3 of the order sought and applied for leave to amend the papers.

THE ARGUMENT

1. Ms Scheepers for the excipient/defendant argued that leave to amend must be refused, and that the respondent/plaintiff had not made out a case for an amendment.
2. Mr Coetsee for the respondent/plaintiff argued a party is entitled to apply to amend its papers at any time before judgment and a court has a discretion only in respect of the “nature of the amendment” and not as to the right to amend.
3. He submitted that the plaintiff is entitled to leave to amend and that the defendant’s complaint regarding the wrong party sued, can be raised as a special plea later in the proceedings. He argued that the was the wrong forum to argue this point.
4. Ms Scheepers referred me to paragraph 17 of her heads of argument and the related authorities in the footnotes which support her argument.

RULE 23 OF THE UNIFORM RULES OF COURT

JOINDER

5. Herbstein and van Winsen state,¹

“a question of joinder whether it be misjoinder or non-joinder, may be raised by way of exception where the defect appears ex facie the pleadings and no evidence is required to substantiate the defence.”

6. *Where it is apparent ex facie the particulars of claim, that a court lacks jurisdiction, or that the plaintiff does not have locus standi or that there is a misjoinder or non-joinder, the defendant may take exception rather than file a special plea, see Collin v Toffie 1944 AD 456 at 466-67, Anderson v Gordick Organisation 1960(4) SA 244 (D) at 247, Anirudh v Samdei 1975(2) SA 706 N at 708, Marney v Watson 1978(4) SA 140 (C) at 146, Smit v Conelect 1987 (3) SA 689 at 691-693, D1-305.*

LEAVE TO AMEND

7. In **Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993 (2) SA 593 (A) at 602 D, Trope v South African Reserve Bank 1993 (3) SA 264 A at 269H, Constantaras v BCE Foodservice Equipment (Pty) Ltd 2007 (6) SA 338 SCA at 348C-F**, the courts confirm, where an exception has been successfully taken that a pleading does not disclose a cause of action, invariably the pleading is set aside and the plaintiff is given leave to file an amended pleading.

¹ Civil Practise in the High Courts of SA 5th ed, p237

8. In **Rowe v Rowe 1997 (4) SA 160 SCA at 167H**, the court agreed and noted that a refusal will be only in exceptional circumstances and then a court must provide reasons for same.
9. This court sees no reason to deviate from the above and must allow the plaintiff an opportunity to prove its claim. The excipient/defendant's dispute on "wrong party sued" can be resolved by an order for costs if successfully proven.

Accordingly, I make the following Order,

1. The exception is upheld.
2. The pleading is set aside
3. Leave to amend is granted.
4. The respondent shall pay the costs of exception.


S MAHOMED
ACTING JUDGE
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15 December 2020.

Date of hearing: 07 September 2020

Date of judgment: 15 December 2020

Appearances:

Appearance for Excipient/defendant:

Adv M Scheepers

(011 263 9000)

Instructed by

Wiese and van den Hoven

015 491 6966

Appearance for Respondent/plaintiff

Adv M Coetsee

082 447 4327

Instructed by

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