



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

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

Date: **17 May 2021** Signature: **ZMP MAJAVU**

**CASE NO: 35381/2020**

**This matter was heard virtually via Microsoft Teams platform**

In the matter between:

AKBAR HASSIM

Plaintiff

and

LISHIVA, ANDREW MBENGENI

Defendant

**Coram:** Majavu AJ

**Heard:** 11 May 2021

**Delivered:** 14 May 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 13h00 on 14 May 2021

Summary: Exception- the defendant raised four (4) grounds of exception on the basis that the particulars of claim are vague and embarrassing, complained about paucity of information, resulting in its ability to decipher the case is called

upon to meet, misconstrued the applicable principles relating to exception, complaining about lack of particularity that could be obtained through request for further particulars, or grounds dismissed with costs on a party and party scale, including those consequent upon the employment of counsel.

---

### **ORDER**

---

- (a) The first to fourth grounds of exception are dismissed.
  - (b) The defendant is ordered to pay the costs, on a party and party scale, including the costs consequent upon the employment of counsel.
- 

**Majavu AJ**

- [1] Before me is an exception, which is opposed.
- [2] The defendant raises four complaints on which the exception is based.
- [3] For better flow and ease of reading, I propose to restate the grounds as set out in the notice of exception here under.
- [4] I will also deal with each in turn.
- [5] I must also commend both counsels for the detailed and helpful heads, for which I am grateful.

## Grounds of complaint

[6] The defendant raises four grounds of complaint, premised on the absence of averments necessary to sustain a proper cause of action, as well as the presence of allegations which it contends render the particulars of claim vague and embarrassing within the meaning of rule 23(1)<sup>1</sup>. It is common cause that the defendant afforded the plaintiff an opportunity to remove the cause of complaint, which invitation was not heeded, hence the adjudication of *this* exception.

### A. The defendant's grounds of complaint

#### The first ground

[7]

*“[1.1] In paragraphs 11, 12, 13 and 14 of the particulars of claim the plaintiff premised its claim on a settlement agreement concluded between the plaintiff and the defendant. The settlement agreement, on the construction of the plaintiff's allegations, was to know vague and replaces all prior agreements concluded between the respective parties (paragraphs 12.3). Here in the plaintiff in paragraph 14 6 specific performance in terms of that agreement.*

---

<sup>1</sup>rule 23 (1) provides as follows “where any pleading is vague and embarrassing lacks the averments which are necessary to sustain action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto....: Provided that where a party intends to take an exception that the pleading is vague and embarrassing, he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days....”

*[1.2] In contrast thereto, the plaintiff claims in paragraphs 15 to 23.2 an alternative claim which is not premised upon any conditional finding in respect of the main claim in respect of the settlement.*

*[1.3] The alternative claim foreshadows a cancellation of the partnership agreement, which preceded the alleged settlement agreement.*

*[1.4] The 2 claims are mutually destructive and cannot exist in unison if regard is had to the fact that the plaintiff is required to make an election in respect of the respective courses of action, albeit to plead out the basis for the alternative claim.*

*[1.5] As a consequence of the aforesaid, the defendant is embarrassed to plead to the vague particulars and as a consequence is prejudiced.*

The second ground

[8]

*“[2.1] In paragraph 9 of the particulars of claim the plaintiff alleges that:-*

*“ on various occasions following the conclusion of the partnership agreement had with regular occurrence the defendant purportedly orally acknowledged his obligation to account and pay to the plaintiff”*

*[2.2] The plaintiff has failed to set out with particularity on which respective dates such acknowledgement was advanced to allow the defendant to respond thereto sensibly.*

*[2.3] As a consequence, the particulars of claim is vague and embarrassing and the defendant is embarrassed to plead thereto, resulting in prejudice to the defendant.*

The third ground

[9]

*[3.1] In paragraph 12 of the particulars of claim the plaintiff claims that on the strength of an oral agreement certain “material, alternatively tacit, further alternatively implied terms...” operate in terms thereof.*

*[3.2] The plaintiff failed to allege out any conduct by the defendant to suggest on what basis it may be concluded that the terms were either tacitly accepted, alternatively impliedly operating between the parties.*

*[3.3] As a consequence, the defendant is embarrassed to plead thereto and suffers prejudice as a consequence thereof.*

The fourth ground

[10]

*[4.1] In paragraph 12.9 of the particulars of claim the plaintiff alleges that the defendant undertook to settle all loan amounts outstanding to Investec.*

*The plaintiff is required to provide particularity on what, and to whom were these loans in favour and to supply all documentary proof relating thereto.*

*[4.2] The plaintiff has failed to set out particularity on details of such loans, to whom such loan was provided to, what amount for and when such amount is due.*

*[4.3] As a consequence, the defendant is embarrassed to plead thereto and suffers prejudice as a consequence thereof.*

#### B. The law applicable to exceptions

##### Vague and embarrassing

[11] In the case of *Inzinger v Hofmeyer and others*<sup>2</sup>, it was said that:

*“4. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. It is not directed at a particular paragraph within a cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing. As was stated in *Jowell v Bramwell-Jones and Others* 1998 (1) SA 83 (W) at 905 E-H:*

---

<sup>2</sup> (7575/2010) [20101] ZAGPJHC 104 (4 November 2010) at paras 4 and 5

*“I must first ask whether the exception goes to the heart of the claim and, if so, whether it is embarrassing to the extent that the defendant does not know the claim he has to meet”*

*Vagueness amounting to embarrassment and embarrassment in turn resulting in the prejudice must be shown. Vagueness would invariably be caused by a defect for incompleteness in the formulation and is therefore not limited to an absence of the necessary allegations but also extends to the way in which it is formulated. An exception will not be allowed, even if it is vague and embarrassing unless the excipient will be seriously prejudiced if compelled to plead against which the objection lies”*

[12] The nature and extent of exceptions based on the ground that a pleading is vague and embarrassing were duly considered by Mc Creath J in the matter of *Trope v South African Reserve Bank* and two others<sup>3</sup> and cited with approval by Heher J in the matter of *Jowell v Bramwell-Jones* the court referred to the following principles pertaining to exceptions:

“(a) Minor blemishes are irrelevant,

(a) Pleadings must be read as a whole, no paragraph can be read in isolation,

---

<sup>3</sup> 1992(3) SA208(T) at 211

(b) 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 of evidence,

(c) Only facts need be pleaded, conclusions of law need not be pleaded,

(d) Bound up with the last mentioned consideration is that certain allegations expressly made to carry with them implied allegations and the pleading must be so read:..."

[13] An exception on the basis that the pleading is vague and embarrassing is also intended to cover the case where, although a case might appear from the claim, there is some defect or incompleteness in the manner in which it has been formulated, resulting in embarrassment to the defendant. Typically, this type of exception is not directed at a particular paragraph within a cause of action, but rather goes to the whole cause of action, as the learned judge correctly observed in the case of *Trope v South African Reserve Bank*<sup>4</sup>.

No cause of action

---

<sup>4</sup> 1993 (3) SA 264 (A) at 269H



[14] When an exception is raised against the pleading on the basis that it lacks averments necessary to disclose a cause of action, this implies that even if one were to accept the factual averments as set out in the pleading is correct, these factual averments do not justify the conclusion of law or the relief the pleader intends to reach. It therefore follows that the defendant cannot plead the defence to a cause of action which does not exist or is otherwise precluded on any lawful ground. The same position was restated in the constitutional case in the matter of Pretorius and Another v Transport Pension Fund and others<sup>5</sup>,

*“[15] in deciding an exception the court must accept all allegations of fact made in the particulars of claim is true, and may not have regard to any other extraneous facts or documents, it may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.”*

[15] Further, as to pleadings which disclose no cause of action, Griessel J stated in *Frank v Premier Hangers CC*<sup>6</sup> that:

---

<sup>5</sup> 2019 (2) SA 37 (CC)

<sup>6</sup> 2008(3) SA594 (C)

*“ [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 which, the exception ought not to be upheld”. This applies with equal force to an exception raised by a defendant to the plaintiff’s particulars of claim.*

[16] *Vermeulen v Goose Valley Investments (PTY)Ltd*<sup>7</sup> Marais JA stated as follows as 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 can be shown that ex facie the allegations made by the plaintiff and any other document upon which his cause of action may be based, the claim is (not may be) bad in law”*

[17] I now turn to the defendants’ grounds of complaint. Before I do so, I make an observation that, the manner in which the grounds have been framed is unnecessarily prolix and borders on being argumentative or a request for further particulars. The issues raised therein appear to be crystallised and very crisp and should have been dealt with as such.

The first ground

[18] In order to properly contextualise the gravamen of the excipient’s first ground, is important to appreciate the formulation of the particulars of claim under

---

<sup>7</sup> 2001(3) SA 986(SCA)

attack. The plaintiff's particulars comprise of the **main claim** (see paragraphs 11 to 14) and an alternative claim to the main claim (see paragraphs 15 to 23 thereof). The main claim rests on the conclusion of a settlement agreement between the parties, each acting personally and orally agreeing to terminate the partnership and settle all claims between them. Flowing therefrom, certain financial consequences ensued as set out in paragraphs 12.1 to 12.13 of the particulars of claim. Chief among them, the defendant was obliged to make payment to the plaintiff of the settlement amount of R8 million and to transfer his shares in a company known as Future Dev Properties ("the Company") to the plaintiff. When this was not complied with by the defendant, the plaintiff instituted payment from the defendant in that amount (together with interest thereon) and as a further order pertaining to the transfer of the 50% shareholding in the company to the plaintiff. The **alternative claim** on the other hand, is pleaded as arising from material (mis)representations, which the plaintiff alleges that induced it to partner with the defendant, resulting in the partnership agreement, now terminated. The plaintiff advised that had it been aware of the falsity of the material representations, it would *not* have entered into the partnership agreement with the defendant. This is a complete and self-standing cause of action. In consequence of the falsity of the material representations made by the defendant, the plaintiff avers that it suffered damages in the sum of R 5 676 520,00 is more particularly set out in paragraphs 19.1 to 19.3 of the particulars. It is my considered view that these damages, quite plainly arise from a different set of facts and circumstances to those on which the main claim is anchored.

[19] Having sketched the above background, the essence of this ground of exception seems to be erratically based on the contention that “*the two claims are mutually destructive and cannot exist in unison if regard is had to the fact that the plaintiff is required to make an election in respect of the respective courses of action, albeit to plead out the basis for the alternative claim*” (sic). Firstly, I do not agree that the plaintiff is under any obligation to make the election as contended for by defendant. Secondly, there is no vagueness in how that claim is formulated, let alone one that could possibly lead to any embarrassment at the instance of the defendant. The case that the defendant has to meet is self-evidently plain and unambiguous. It’s *main claim* is rooted in the settlement agreement and resultant non-compliance there with, whereas, *the alternative claim* is based on material misrepresentations, the truth of which had it been known to the plaintiff, the latter would not have entered into the partnership agreement.

[20] The alternative claim is by definition, an alternative (something other than) what is contended in the main claim. It therefore flows that the main in the alternative claim by extension of logic do not necessarily have to coexist, to enable a defendant to fully appreciate the case it is called upon to meet. In both instances, the material facts are sufficiently contained in the pleading. Put differently, the necessary facts which the plaintiff would be required to prove in order to support its claim, have been disclosed in sufficient detail. It is not necessary for every piece of evidence required to prove each fact to be pleaded.

In *Evidence v Shield Insurance Co. Ltd*<sup>8</sup> it was said that “*cause of action... is ordinarily used to describe the factual basis, the said of material facts, that begets the plaintiff’s legal right of action*”. I align myself with this dictum. [My emphasis]

I am in full agreement with the plaintiff’s counsel when he contends that the allegations that do not serve to establish the cause of action would not qualify as being “material”. Further, every pleading 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. In this case I am persuaded that such particularity has indeed been provided. The defendant misconstrues the full import of both the main and alternative claims, resulting in its mistaken view regarding the election which it argues ought to have been made by the plaintiff, as well as the nonexistence “in unison” argument. It goes without saying that in the adjudication of the claim, a court would first have to consider the main claim, and in the event that such claim succeeds, there is no need to consider the alternative claim and *vice versa*. I fail to see on what basis it could ever be argued that the two claims are “mutually destructive”, when coexistence is not a prerequisite. The complaint raised in this ground does not go to the heart of the cause of action as a whole, in respect of both the main and alternatively claim. In the result, this ground of exception falls to be dismissed.

The second ground

---

<sup>8</sup> 1980[2] as a 814 A at 825G

[21] This ground of exception is directed at paragraph 9 of the particulars. The complaint is rooted in the fact that *“the plaintiff has failed to set out particularity on which respective dates such acknowledgement was advanced to allow the defendant to respond thereto sensibly”* (sic) as a result of that paucity of detail, according to the defendant, the particulars are vague and embarrassing resulting in its embarrassment to plead thereto and a further consequence being prejudice.

[22] It is plain that the acknowledgement referred to is oral acknowledgement to the plaintiff by the defendant at Johannesburg and pleaded as “on various occasions following the conclusion of the partnership agreement on or about 29<sup>th</sup> of the 2 July 2016. The dates have clearly been provided, as well as the place (Johannesburg). Further dates have been particularised in paragraph 9.1, read with para 3.6.3 thereof. The defendant seems to have directed it’s attack on a particular paragraph and not the entire cause of action, considered holistically. In the result, I am at loss to see any demonstrable vagueness leading to embarrassment and prejudice at the instance of the defendant. It is still open to the defendant to request for further particulars. Exceptions are only reserved for instances where the particulars are so vague and embarrassing to a point that it goes to the root of the cause of action, and especially when such cause of action is not clearly set forth in an intelligible manner. Not in a manner that the defendant agrees with. The test is whether or not, based on the pleading as it currently reads, is the defendant able to decipher the cause of action based on the material facts pleaded, to enable it to know what case it has to meet, not the pieces of evidence required to sustain it. In other words, an exception that a pleading is

vague and embarrassing must strike at the formulation of the cause of action and not its validity.<sup>9</sup> [my emphasis]

[23] I agree with the plaintiff's counsel that the defendant has failed to indicate why the alleged embarrassment, if any, is so serious that it is unable to plead and is thus prejudiced and further, the particularity which the defendant requires is not capable of being obtained in terms of the quest for further particulars, as I indicated above. Consequently, this ground is unmeritorious and falls to be dismissed.

The third ground

[24] This ground is directed at paragraph 12 of the particulars with specific reference to the phrase "*the material express, alternatively tacit, further alternatively implied terms*" of the settlement agreement. Again, this complaint is ill-conceived as it could easily be dealt with by way of a request for further particulars. In any event, I fail to see why it is embarrassed and able to plead simply because it has not been pleaded which terms were tacit alternatively implied. In such cases, the defendant could simply admit, deny, confess or avoid all those material facts alleged there in, which are in any event sufficiently and intelligibly pleaded. This ground must also fail.

The fourth ground

---

<sup>9</sup> VENTER and others NNO v Barritt, VENTER and others NNO V Wolsberg Arch Investment 2 (Pty) Ltd 2008 (4SA639 (see) at 643I-644A v

[25] This ground is directed at paragraph 12.9 which deals with the acquisition of the 3 apartments from Odyssey Luxury Lifestyle, loan accounts to Investec and the sale agreement with one Jarod Kolman on behalf of Odyssey Luxury Lifestyle. The complaint is interestingly couched in the language of the request for further particulars, and correctly so, only if that mechanism was employed, as is indeed open to the defendant to do so. Far from being a ground for exception, this is a classic and textbook case of the formulation of the request for further particulars in terms of Rule 21. At bare minimum, the plaintiff is only required to plead the necessary *facta probanda* and not *the facta probantia*, as the latter falls into the category of secondary allegations (pieces of evidence) on which the plaintiff will rely in order to prove its primary allegations, those being matters for trial. This ground of attack is accordingly misplaced.

[26] I find the pleading in this regard to be concise, intelligible and very apparent. The absence of the information complained of by the defendant does not render the pleading vague and embarrassing, let alone resulting in serious prejudice. This ground of exception is accordingly dismissed.

#### Costs

[27] I do not see why costs should not follow the result.

#### The order

[28] I accordingly grant the following order:



28.1 The first to fourth grounds of exception are dismissed.

28.2 The defendant is ordered to pay costs on a party and party scale, including the costs consequent upon the employment of counsel.



---

**Z M P MAJAVU**

*Acting Judge of the High Court*

*Gauteng Local Division, Johannesburg*

---

HEARD ON:	12 May 2021
JUDGMENT DATE:	14 May 2021
FOR THE PLAINTIFF:	Adv N Konstantinides SC
INSTRUCTED BY:	Van Hulsteyns attorneys
FOR THE DEFENDANT :	Adv IL Posthumus
INSTRUCTED BY:	Afzel Seedat Incorporated.