



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

(1)	REPORTABLE: <i>no</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>no</i>
(3)	REVISED:
Date: <u>02/11/2021</u> Signature:	

Case No. 19595 / 2020

In the matter between:

CESSNA MEAT SUPPLIES CC
 (Registration Number.:1998/07161/23)

Plaintiff / Respondent

and

GERHARD MASCHWITZ
 T/A EDENGLLEN BUTCHERY

Defendant / Excipient

JUDGMENT

ALI AJ

[1] This is an exception by the Defendant / Excipient against the Plaintiff's/Respondent's amended particulars of claim. The parties herein shall be referred to as plaintiff and defendant.

- [2] In this action, the plaintiff is allegedly suing the defendant for payment in the amount of R442 584.11. In their particulars of claim, the plaintiff pleaded that a partly written, partly oral agreement was entered into where the oral portion of the agreement was that the plaintiff agreed to sell and deliver meat products ("the goods") for an indefinite period, at the specific instance and request of the defendant. The further terms of the oral portion of the agreement were that the defendant would make payment for the goods within 7 days from the date of the invoice.
- [3] The plaintiff further pleaded that the invoices constitute the written portion of the agreement. The invoices which constitute the written portion are attached to the amended particulars of claim as 'A1 to A18'.
- [4] The defendant delivered its second exception on 12 January 2021. The exception was signed by the attorney only. The plaintiff has taken issue with this point and submits that the exception ought to be signed by both an advocate or in both capacities by the attorney. One of the capacities of an attorney is that of right of appearance. It is noted that the defendant's attorney has uploaded the certificate in terms of section 4(2) of the Rights of Appearance in Courts Act 62 of 1995. The point, however, is the capacity of the attorney signing the notice of exception. The upload has come a little too late.
- [5] The defendant excepts to the plaintiff's amended particulars of claim on the basis that it is vague and embarrassing and / or does not make out a cause of

action. Initially the defendant raised three grounds for cause for complaint, it abandoned the third cause thereby continuing with the first two causes for complaint.

- [6] The defendant's first cause for complaint refers to paragraph 3.3 of the amended particulars of claim. The defendant claims that it cannot identify certain annexures which consist of a one- page and a two-page document. The defendant claims that the annexures contain hand-written notes and various amounts. The defendant identifies with the annexed credit note.
- [7] The defendant claims that the attached annexures are at variance with the particulars of claim and for this reason the defendant is unable to reconcile itself with the plaintiff's figures in support of its case. The defendant avers that the particulars of claim are vague and embarrassing and / or do not make out a cause of action and the defendant claims that it is prejudiced thereby in that it is not able nor capable of pleading thereto.
- [8] The defendant's second cause for complaint refers to paragraph 6 of the particulars of claim where reference is made to an annexure which comprises of a schedule compiled by the plaintiff premised on the invoices rendered. Rather than dealing with the aforesaid document only, the defendant, again, claims that all the documents are not invoices and that the defendant cannot identify a two-page and a one-page document which comprises of handwritten notes and various amounts. The defendant again claims to identify the credit

note. The defendant claims that the aforesaid annexures are not provided for and / or set out in the plaintiff's schedule.

[9] The defendant further claims that due to the variation of the schedule against the invoices and the credit note, the particulars of claim are vague and embarrassing and/or do not make out a cause of action as the defendant is unable to reconcile itself with the figures. The defendant claims that it is prejudiced thereby and is incapable of pleading thereto.

[10] The defendant elaborates on the nature of the prejudice suffered in the heads of argument. By doing so, the defendant has raised new grounds of exception. The grounds of exception raised by the defendant is that the plaintiff failed to plead the material terms of the written portion; the particulars of claim lacks detail, particularity and is inconclusive; requires of the defendant and this Court to speculate as to what exactly comprises the material terms of the alleged partly oral, partly written agreement concluded between the parties; is not supported by factual allegations in the pleadings. The plaintiff submits that the defendant's reliance on the *facta probantia* is irrelevant at the exception stage. The defendant claims that the documents relied upon by the plaintiff in support of its case are not referred to in the pleadings.

[11] The plaintiff submits that it is well established that an excipient is constrained to and bound by the grounds in the notices. It is settled law that:

"The test on exception is whether on all possible readings of the facts no cause of action may be made out. It is for the excipient to satisfy the

court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts”¹

- [12] The new grounds of exception raised by the defendant in the heads of argument does not accord with the grounds raised in the notice. The exception must fail on the ground that the particulars of claim does not disclose a cause of action.
- [13] On the grounds raised by the defendant that the particulars of claim are vague and embarrassing, an exception on this basis must be directed at the particulars of claim as a whole and not at a particular paragraph.² The defendant directed its exception at paragraphs 3 and 6 of the particulars of claim.
- [14] The defendant has failed to sustain its exception on both grounds: excepting to the particulars of claim being vague and embarrassing and / or fails to make a cause of action.
- [15] In a final bid to revive the notice of exception, the defendant places reliance on paragraphs 37 to 41 of Chapter 7 of the 2021 version of the Judge President’s Practice Directive. These paragraphs depend on a matter being trial ready. The stage that the parties are currently in are the early stages of litigation.
- [16] In the premises, the exception is dismissed. I shall award costs on a punitive scale, the main reason being that the attorney failed to sign the notice as would be done in a pleading. The notice falls short of this requirement.

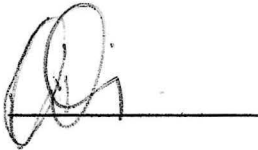
¹ Trustees for the Time Being of the Children’s Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others 2013 (2) SA 213 (SCA) at para 36

² Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W); Ritchie Motors v Moolman 1956 (4) SA 337 (T)

[17] The following order is made:

17.1 The exception is dismissed

17.2 The excipient/defendant is ordered to pay the plaintiff's costs on an attorney and client scale.

A handwritten signature in dark ink, appearing to be 'N. Ali', is written over a horizontal line.

N. ALI

ACTING JUDGE OF THE HIGH COURT, JOHANNESBURG

DATE OF HEARING: 20 OCTOBER 2021

DATE OF JUDGMENT: 02 NOVEMBER 2021

COUNSEL FOR THE EXCIPIENT/DEFENDANT: L DE WET

INSTRUCTED BY: L T HAWES

COUNSEL FOR PLAINTIFF: C VAN DER MERWE

INSTRUCTED BY: BOUWER MALHERBE