


REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2021/10241

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

16 November 2021
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SIGNATURE
DATE

In the matter between:

OUTSURANCE INSURANCE COMPANY LIMITED

Excipient/Defendant

and

NAYE LUPONDWANA

Respondent/Plaintiff

Delivered: 16 November 2021 - This judgment was handed down electronically.

JUDGMENT

Karachi AJ:

Introduction

[1] This is a judgment on an exception. In the main action, the plaintiff claims damages from the defendant arising from an alleged breach of contract together with other ancillary relief. On 29 March 2021, the defendant ("the excipient") gave notice to remove a cause of

complaint on the ground that the plaintiff's particulars of claim were vague and embarrassing, lacked averments necessary to sustain a cause of action, lacks sufficient particularity to enable the excipient to reply thereto and/or contains averments that are scandalous, vexatious or irrelevant. The plaintiff opposed the notice whereafter, on 6 May 2021, the excipient gave notice of an exception.

[2] This matter came before me on 25 October 2021. Adv Jansen van Vuuren appeared on behalf of the excipient. The plaintiff, Mr Lupondwana appeared in person and is a self-represented litigant. The plaintiff has filed a notice to oppose the exception together with supporting annexures thereto and has filed heads of argument in response to the excipient's heads of argument. The plaintiff has further filed an interlocutory notice in terms of rule 33(1) setting out facts which he seeks to have the court adjudicate on as a stated case. I shall turn to the plaintiff's rule 33(1) notice later in this judgment. I first turn to the primary matter before me, that is the exception.

[3] The excipient has raised 5 grounds of exception. In summary these are:

- [3.1] That the plaintiff relies on a verbal insurance agreement but fails to plead the date, place, representations of the parties when it was concluded, the material terms thereof and whether the terms were express, tacit or implied ("the first ground of exception – agreement unclear");
- [3.2] That the plaintiff alleges a breach by the excipient of the insurance agreement but fails to allege when the breach occurred and how. The plaintiff further appears to claim damages based on repudiation but fails to allege cancellation and specific performance. As a result, the plaintiff has failed to allege the breach with sufficient particularity to enable the excipient to respond thereto ("the second ground of exception – breach of contract unclear");
- [3.3] That the plaintiff alleges that the excipient was unjustly enriched at the plaintiff's expense but fails to allege facts to establish that the alleged enrichment was unjustified ("the third ground of exception – unjustified enrichment unclear");
- [3.4] That the plaintiff fails to plead the damages he claims with sufficient particularity to be able to prove his damages and/or to enable the excipient to reply thereto ("the fourth ground of exception – damages unclear");
- [3.5] That the particulars of claim, in particular paragraphs 9, 10.7 and 12 to 17, contain matter that are scandalous, vexatious and irrelevant and/or are vague and the excipient is embarrassed to plead thereto ("the fifth ground of exception – scandalous, vexatious, irrelevant").

The exception procedure

- [4] The exception procedure serves litigants and the justice system in that it weeds out cases that ought not go to trial. It serves a public policy purpose. A well-taken exception can bring an end to proceedings that have no merit even when all the averments made in the pleading are accepted to be correct. In such a case a plaintiff cannot succeed in its claim, nor a defendant in its defence because the pleading in question does not disclose a cause of action or a defence, as the case may be. This is in the interest of the proper administration of justice and ultimately in the interest of litigants who are not compelled to undertake costly and time-consuming litigation with no hope of success.
- [5] A pleading may disclose a cause of action but may be so inelegantly pleaded that a litigant finds it difficult to understand the case it has to meet. An exception may then be upheld on the basis that the pleading is vague and embarrassing. Again, the exception should then make the impending litigation more efficient.
- [6] It is however trite that substantial justice need not yield to technicalities. Since pleadings are made for the court and not the court for the pleadings, it is the duty of the court to determine the real issues between the parties, and provided no possible prejudice can be caused to either, to decide the case on those real issues.
- [7] In considering an exception, a court commences from the premise that the allegations contained in the particulars of claim are correct and considers the pleadings as a whole. An excipient needs to show that the pleading is excipiable on every possible interpretation that can reasonably be attached to it.

The first and second ground of exception – the agreement and breach unclear

- [8] At paragraph 3 of the particulars of claim, the plaintiff pleads that *“On 14th August 2020 plaintiff sent a letter of demand to defendant, demanding payment as fulfilment of promise made by defendant as per contractually agreement entered into by the two parties. The promise was in reciprocation of monthly instalments or monthly insurance premiums paid by plaintiff to defendant. The terms of this agreement insured moveable goods at the said premium and reciprocally, the defendant would reimburse the plaintiff the promised value of the moveable goods should they get lost or stolen or anything like that happen to said movable goods”*.

[9] The plaintiff pleads that the excipient breached the agreement by refusing to comply with the contract where the excipient promised to reimburse the plaintiff the value of the goods should they get lost and that the plaintiff brought this loss to the attention of the excipient in the prescribed fashion stipulated by the excipient.

[10] The plaintiff further pleads that the excipient refused to keep its promise made and that the reason supplied by the excipient for not being able to keep its promise, that is proof of ownership of the property, was never a term of the agreement and was not stipulated in the agreement. The plaintiff goes on to plead that the excipient stated that it will not be honouring the contract but continued to unlawfully enrich themselves by debiting the plaintiff.

[11] The excipient says that the plaintiff alleges and relies upon a verbal insurance agreement but fails to allege the date, place, representations of the parties when it was concluded, the material terms thereof and whether they were express, tacit or implied, what the “promised values” were and what “or anything like” loss or theft included. In respect of breach, the excipient says that the plaintiff fails to plead what the representations of the parties were and when these representations were breached. Further, that the plaintiff is claiming damages for an alleged repudiation but fails to allege cancellation and specific performance of the agreement. As a result, the excipient argued that the plaintiff failed to allege the agreement and its terms with sufficient particularity to prove his claim based thereon and to enable the excipient to reply thereto and that without these, a conclusion of law that the agreement was breached cannot be drawn and/or the particulars of claim is vague and embarrassing and the excipient is embarrassed to plead thereto which causes prejudice.

[12] In response, the plaintiff argued that it is not open to the excipient to allege as it does that the agreement was unclear. The plaintiff argued that the excipient, as an insurance company and the insurer, it should know what the terms of the agreement were and cannot challenge the validity of the agreement.

[13] The plaintiff refers, in his notice to oppose the exception, to several documents which he attached thereto. These documents include, among others a policy renewal notice and provisional schedule. These appear to set out insurance cover details, monthly premium amounts, contents cover, special conditions etc. Also attached to the notice to oppose is correspondence between the parties. The plaintiff states, in his notice to oppose, that these documents support his claim and provides the excipient with the details that the

excipient claims it does not know. However, no notice to amend the particulars of claim has been filed by the plaintiff in this regard.

[14] The issue for determination by this court is whether the plaintiff has pleaded the agreement and the terms thereof with sufficient particularity in his particulars of claim as it stands.

[15] It is trite that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law.

[16] A particulars of claim must comply with the requirements for pleading set out in rule 18 of the Uniform Rules of court. Rule 18(4) provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

[17] The necessity to plead material facts is fundamental to the judicial process. The facts have to be established. The court, on the established facts, applies the rules of law and draws conclusions as regards the rights and obligations of the parties. A summons that propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. The facts set out must constitute the premises for the relief sought. They must be such that the relief prayed for flows from them, and can properly be granted. Otherwise, the summons will be excipiable as disclosing no cause of action.

[18] Pleadings must therefore be lucid and logical and in an intelligible form, the cause of action must appear clearly from the factual allegations made. A pleading contains sufficient particularity if it identifies and defines the issues in such a way that it enables the opposite party to know what they are. The degree of particularity will depend upon the circumstances of each case.

[19] In the matter at hand, the plaintiff pleads that he is demanding payment as fulfilment of a promise made by the excipient in terms of a contractual agreement which promise was in reciprocation of monthly insurance premiums paid by the plaintiff to the excipient. The plaintiff further pleads that the terms of the agreement insure moveable goods at the premium and the excipient reciprocally had to reimburse the plaintiff the promised value

of the moveable goods should they get lost or stolen or anything like that happen to the moveable goods. The plaintiff however fails to plead in his particulars of claim when the agreement was entered into; what the material terms were; whether the plaintiff complied with his obligations in terms of the agreement. In particular, the plaintiff fails to plead what moveable goods were insured, what were they insured against, what the 'promised value' was in respect of the movable goods, whether the plaintiff complied with his obligations in terms of the agreement and what happened to the movable goods.

[20] The plaintiff cannot, in answer to the exception, rely on the fact that the excipient of its own knowledge knows what the terms of the agreement were and what case it has to meet. The plaintiff further cannot rely on the averments made in his notice of opposition to the exception to found his claim. These averments ought to have been pleaded in the particulars of claim so as to enable the excipient to know what case it has to meet. It must further be borne in mind that the particulars of claim is for the information of the court as well and not just the parties.

[21] In order to ensure that a particulars of claim is not excipiable on the ground that it does not disclose a cause of action, the plaintiff must allege the *facta probanda* (the facts which must be proved in order to disclose the cause of action). In *McKenzie v Farmer's Cooperative Meat Industries Ltd* 1922 AD 16 at 23 the Appellate Division held that this includes "... *every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.*"

[22] The plaintiff must plead a complete cause of action that identifies the issues on which the plaintiff seeks to rely, and on which evidence will be led, and which allows the defendant to plead to it. This the plaintiff fails to do.

[23] The first and second exception is accordingly upheld.

The third ground of exception – unjustified enrichment unclear

[24] In respect of the plaintiff's unjustified enrichment claim, the plaintiff claims the sum of R3 761, 30. The plaintiff refers to this claim as the 'unjustified monthly premiums'. The plaintiff further claims R 485 100 000, 00. This, the plaintiff refers to as the 'unjustified enrichment' made up of 15.8% of the defendant's 'annualized earnings' for the year 2020.

[25] The excipient says that the plaintiff fails to allege facts to establish the enrichment/s and further that the documents relied upon in respect of the alleged unjustified monthly premiums contradicts the allegations made by the plaintiff in his particulars of claim. The excipient says that the particulars of claim lack averments necessary to sustain the plaintiff's cause of action and/or is vague and the excipient is embarrassed to plead thereto which causes it prejudice.

[26] However, on a reading of the particulars of claim, the claim in respect of 'unjustified monthly premiums' has been sufficiently set out to enable the excipient to respond thereto. The evaluation of prejudice is a factual enquiry, and is a question of degree. The decision must necessarily be influenced by the nature of the allegations, their content, the nature of the claim and the relationship between the parties. I therefore find that the excipient is able to respond to the claim for 'unjustified monthly premiums'.

[27] However, in respect of the plaintiff's claim for 'unjustified enrichment' the plaintiff merely pleads that this claim is made up of 15.8% of the excipient's annualized earnings for the year 2020 and that this is as a result of the 15.8% loss of earnings by the plaintiff in 2020. No basis is pleaded by the plaintiff in his particulars of claim in support of his claim for unjustified enrichment. The claim as pleaded is bad in law.

[28] I therefore find that the excipient is prejudiced in pleading thereto and accordingly, the third exception in respect of the plaintiff's alleged 'unjustified enrichment' claim of R485 100 000, 00 is upheld.

Fourth ground of exception – damages unclear

[29] The plaintiff claims damages under various heads. These are for loss of moveable goods, 'unspecified cover', 'unjustified monthly premiums', 'unjustified enrichment' and general damages.

[30] The excipient says that the plaintiff has failed to set out his damages in such a manner as to enable the excipient to reasonably assess the quantum thereof and has further failed to allege that the damages flow from the alleged breach of the agreement.

[31] On a reading of the particulars of claim, the plaintiff fails to plead

[31.1] what the agreed value of the moveable goods were and how he arrives at the amounts so claimed;

[31.2] what is included under 'unspecified cover' and the factual basis giving rise to this claim;

[31.3] the factual basis for the unjustified enrichment claim and how he arrives at the amount of R 485 100 000, 00;

[31.4] the factual basis for the claim for general damages and how he arrives at the amount of R 7 200 000, 00.

[32] No factual foundation has been pleaded in the particulars of claim which would sustain the claims under these rubrics. I accordingly uphold this ground of exception.

Fifth ground of exception – scandalous, vexatious, irrelevant

[33] The excipient argues that the averments made by the plaintiff in paragraphs 9, 10.7, and 12 to 17 are scandalous, vexatious and irrelevant and/or the plaintiff's particulars are vague and the excipient is embarrassed to plead thereto all of which causes prejudice.

[34] The distinction between an application to strike out matter contained in a pleading and an exception is clear. An exception goes to the root of the entire claim or defence as the case may be. An application to strike out, though directed at individual paragraphs, may involve the destruction of the whole pleading.

[35] Although there is a difference in principle between an exception and an application to strike out, both forms of relief can be applied for simultaneously, either together or in the alternative. The distinction in principle should however be borne in mind.

[36] Rule 23 deals with notices of exception as well as applications to strike out. An exception is taken to a pleading which is vague and embarrassing or lacks averments which are necessary to sustain an action or defence. An application to strike out is permissible in respect of a pleading which contains averments which are scandalous, vexatious or irrelevant. The decisive factor in determining whether to grant the application to strike-out is the existence of prejudice to the applicant in the conduct of his claim or defence if it is not granted.

[37] In an application to strike out the aggrieved party should not only state the nature of his objection but he must also state the basis why the offending matter is irrelevant, scandalous, or vexatious. Furthermore, he must show that the offending matter is prejudicial to his case if it were allowed to remain.

[38] Applications to strike out are taken by way of motion upon proper notice to the other party indicating the passages that are being objected together with a brief statement of the grounds of the objection.

[39] In the plaintiff's supplementary affidavit, the plaintiff avers that on 8 July 2021, the excipient brought an urgent application interdicting the plaintiff from making the same statements the excipient claims are vexatious in this matter. The interdict was dismissed with costs.

[40] The excipient argued that the urgent interdict was sought after the exception was filed on grounds that arose in the plaintiff's heads of argument filed in this exception specifically paragraphs 1.6 to paragraph 1.7.2 thereof and different relief was sought.

[41] The excipient has however failed to file an application to strike out the averments it contends are scandalous, vexatious and irrelevant.

[42] Rule 23(2) provides that where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter, and may set such application down for hearing within five days of expiry of the time limit for the delivery of an answering affidavit or, if an answering affidavit is delivered, within five days after the delivery of a replying affidavit or expiry of the time limit for delivery of a replying affidavit, referred to in rule 6(5)(f): Provided that – (a) the party intending to make an application to strike out shall, by notice delivered within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of delivery of the notice of intention to strike out; and (b) the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted.

[43] There is however no application before me to strike out the averments that are alleged to be scandalous, vexatious and irrelevant. What is before me is an exception in terms of

which the excipient alleges that the averments made are abusive and defamatory alternatively vague and embarrassing.

[44] An exception that a pleading is vague and embarrassing is not directed at a particular paragraph it goes to the whole cause of action.

[45] On the facts before me the excipient has failed to comply with rule 23 in this regard. The fifth ground of exception is accordingly dismissed.

The plaintiff's rule 33(1) notice

[45] The plaintiff has filed a rule 33(1) notice in terms of which he seeks the court to issue an order declaring the tabulated chronology of events set out therein as common cause.

[46] Rule 33(1) provides that the parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court. Rule 33(2) provides that such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.

[47] At the hearing of this matter, the excipient argued that the rule 33(1) refers to documents rather than a statement of facts as envisaged in the rule and that the notice is in any event not applicable to the exception.

[48] Apart from the fact that the notice does not comply with rule 33, the interlocutory rule 33(1) notice is irrelevant to the exception and is not properly before me.

Costs

[49] The excipient has been substantially successful herein and ordinarily should be awarded costs.

[50] However, the plaintiff is a self-represented litigant. He is desperate to access the courts and have his case adjudicated on. The series of unfortunate events in respect of this

exception must be seen in this context. In the exercise of the court's discretion and having regard to the circumstances of this case a cost order against the plaintiff will have a chilling effect on the plaintiff. Furthermore, the exception on the third ground (in part) and the fifth ground has been dismissed. As a result, each party is to pay its own costs.

Order

[51] I make the following order:

- [51.1] The first, second and fourth exception are upheld.
- [51.2] The third exception in respect of the claim for unjustified enrichment relating to the amount of R 485 100 000, 00 is upheld.
- [51.3] The fifth exception is dismissed.
- [51.4] The Plaintiff is granted leave to amend its particulars of claim within 21 days of the order of this court.

F KARACHI

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Excipient/Defendant: Adv Jansen van Vuuren

For the Respondent/Plaintiff: Mr Lupondwana

Date of the hearing: 25 October 2021

Date of the judgment: 16 November 2021