

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: **3rd December 2021** Signature: _____

A handwritten signature in black ink, appearing to be "P. H. ...", is written over the signature line.

CASE NO: 35115/2020

DATE: 3RD NOVEMBER 2021

In the matter between:

HERAUT PUBLISEERDERS (EDMS) BEPERK

Plaintiff

and

LOWE, ANETTA JACOBA

Defendant

Coram: Adams J

Heard: 23 November 2021 – The 'virtual hearing' of the application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 3 December 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 3 December 2021.

Summary: Civil procedure – Exception to particulars of claim – defendant contends that particulars of claim are vague and embarrassing, in addition to not

disclosing a cause of action – cause of action alleged to be fraud and theft –
exception dismissed

ORDER

- (1) The defendant's exception to the particulars of plaintiff's claim is dismissed with costs.
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JUDGMENT

Adams J:

[1]. I shall refer to the parties as referred to in the main action. The defendant excepts to the amended particulars of plaintiff's claim on a number of grounds, some of which allege that the particulars are vague and embarrassing, whilst other grounds of exception allege that the particulars do not disclose a cause of action. Some, if not all of the grounds of exception, are of an overly technical nature.

[2]. A brief overview of the applicable general principles is necessary before I consider the exception raised by the defendant and the grounds on which they are based. These general principles, as gleaned from the case law, can be summarised as follows.

[3]. In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action. The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

[4]. The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception

is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed. An excipient who alleges that a pleading does not disclose a cause of action or a defence must establish that, upon any construction of the pleading, no cause of action or defence is disclosed.

[5]. 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. Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained. Minor blemishes and insignificant embarrassments caused by a pleading can and should be cured by further particulars.

[6]. Having said the foregoing, however, exceptions are to be dealt with sensibly since they provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility and insofar as interpretational issues may arise, the mere notional possibility that evidence of surrounding circumstances may influence the issue should not necessarily operate to debar the Court from deciding an issue on exception.

[7]. Where, however, an exception is based upon the fact that a pleading is vague and embarrassing, the 'every reasonable interpretation' approach highlighted above does not apply, and an exception may be taken to protect one's self against embarrassment.

[8]. That brings me to the exception raised by the defendant in casu and the grounds on which such exception is based.

[9]. Firstly, the defendant alleges that the particulars of plaintiff's claim vexatiously and scandalously aver that the defendant committed a fraud against the plaintiff. A fraud, so the defendant contends, is a serious allegation which must be clearly and distinctly pleaded and fraud can only be perpetrated upon a person if the other had the intent to induce by a misrepresentation and in fact induced the person to act to her or his prejudice. The defendant objects on these grounds to the allegation by the plaintiff that 'the defendant committed fraud against the plaintiff by intentionally misappropriating an amount R724 701.88'. In the absence of the distinct allegations relating to misrepresentation and the

plaintiff being induced thereby, so the defendant submits, it is 'a grave and ugly thing to say that the defendant committed a fraud'.

[10]. The difficulty with this so-called ground of exception is that it is bad in law. An allegation that an averment in a pleading is vexatious and scandalous, aimed at annoying, destroying, harassing and defaming the defendant, whilst it may well be a ground to strike out such an allegation, is, in my view, not a ground for an exception. In any event, a delictual claim based on fraud, unlike one founded on contract, does not require that there should have been a misrepresentation by the defendant.

[11]. This ground of exception is therefore stillborn.

[12]. The same applies to the defendant's second ground of exception relating to the allegation in the particulars that the defendant 'intentionally stole R724 701.88 from the plaintiff'. The defendant's objection, as I understand it, is that the plaintiff does not allege ownership of the said amount. Not much needs to be said about this ground, which singularly demonstrates a complete misunderstanding of a fundamental principle. In any event, the allegation is that the monies were stolen from the plaintiff, which can and should be interpreted by the reader that before being stolen by the defendant, the money was the property of the plaintiff. That then spells the end of this ground of exception.

[13]. Thirdly, the defendant contends that the particulars of claim lack the necessary averments to sustain an action in that, as regards the fraud, causation, which is a material element of plaintiff's cause of action, is not specifically pleaded. The defendant also repeats the complaints relating to misrepresentation as a requirement for fraud. I repeat what I have said above. That contention is misguided and this ground of exception is not sustainable.

[14]. Fourthly, the defendant objects to the manner in which the plaintiff has quantified its claim. The plaintiff fails, so the defendant submits, by simply equating their alleged damages to the total amount of missing cashbook receipts. This is how the plaintiff pleads the quantum of its loss:

'5.5. The amount of R724 701.88, is made up as per annexure "POC2", which is a schedule which compares amounts invoiced by the defendant on behalf of the

plaintiff for each month against amounts recorded by the defendant, in the plaintiff's accounting records as having been paid. The difference between the amounts invoiced versus payments records represents the amount which the Defendant intentionally and unlawfully misappropriated for herself.'

[15]. I can see no difficulty with the manner in which the plaintiff has pleaded the quantum of its damages as well as the way in which it has been set out. It is relatively simple. On a monthly basis, the plaintiff received payment of X amounts. In the receipt books, which were under the control of the defendant, Y amounts were recorded. The difference between X and Y was pocketed by the defendant and therefore represents the plaintiff's damages. The defendant, in excepting to the particulars of claim on this ground, is clutching at the proverbial straws. This ground of exception should therefore be rejected.

[16]. Lastly, the defendant objects to the plaintiff's claim based alternatively on the *condictio furtiva* and intentional theft. *Condictio furtiva* for intentional theft as a cause of action, so the defendant contends, is available exclusively to an owner of an item or thing and in such an action, ownership is material to the cause of action. Therefore, so the argument on behalf of the defendant is concluded, plaintiff has failed to plead this alternative cause with sufficient particularity and fails to make out a case. Viewed, as a whole, there can be no doubt that the case of the plaintiff is pleaded, either expressly or by implication, that it was owner of the amount stolen by the plaintiff. It cannot therefore be said that, on every possible interpretation of the particulars of claim, no cause of action is made out.

[17]. Therefore, this last ground of exception should also be rejected.

[18]. Accordingly, the exception to the particulars of plaintiff's claim should be dismissed.

Costs

[19]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are

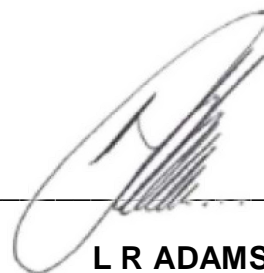
good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*¹.

[20]. Applying this general rule, the defendant should be ordered to pay the costs of the exception application.

Order

[21]. Accordingly, I make the following order: -

- (1) The defendant's exception to the particulars of plaintiff's claim is dismissed with costs.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	23 rd November 2021 – in a 'virtual hearing' during a videoconferences on <i>Microsoft Teams</i>
JUDGMENT DATE:	3 rd December 2021 – judgment handed down electronically
FOR THE PLAINTIFF / RESPONDENT:	Adv Taryn Lipshitz
INSTRUCTED BY:	M Van Zyl Attorneys, Johannesburg
FOR THE DEFENDANT / EXCIPIENT:	Attorney Matthew Webbstock
INSTRUCTED BY:	J C Van der Merwe Attorneys, Sandringham, Johannesburg

¹ *Myers v Abramson*, 1951(3) SA 438 (C) at 455