

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: **29th September 2022** Signature: _____

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

CASE NO: 34755/2021

DATE: 29TH SEPTEMBER 2022

In the matter between:

PEREIRA, RUI EMANUEL GOMES

Plaintiff

and

GRIFFITH, DIANE JILL

Defendant

Coram: Adams J

Heard: 24 May 2022 – The 'virtual hearing' of the application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 29 September 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to *SAFLII*. The date and time for hand-down is deemed to be 10:00 on 29 September 2022.

Summary: Civil procedure – Exception to particulars of claim – plaintiff contends that particulars of claim are vague and embarrassing and do not disclose cause of action – no details given from which tacit agreement to be implied – not so – 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]. The parties shall be referred to as referred to in the main action, in which the plaintiff sues the defendant for declaratory relief based on an alleged universal partnership between the parties, which came into existence, so the plaintiff alleges, whilst they were living together as husband and wife from 1994 to 2021, when their romantic relationship came to an abrupt end.

[2]. The defendant excepts to the plaintiff's amended particulars of claim on the basis that it does not disclose a cause of action. And the grounds of the exception are set out in the paragraphs which follow.

[3]. It is pleaded by the plaintiff in his particulars of claim that '[d]uring the course of [their] relationship, from ... 1994 until 19 March 2021 ..., the parties entered into an implied, alternatively, a tacit universal partnership agreement' by their conduct. The defendant objects to this assertion by the plaintiff. It does not appear from the particulars of claim, so the defendant complains, whether the plaintiff seeks to assert any relevant difference between the notion of an 'implied agreement' and that of a 'tacit agreement' and, as such, what meaning is to be ascribed to each such alleged agreement. I am of the view that nothing should turn on this issue especially not in the context of the exception raised by the defendant. This complaint is, in any event, not a ground on which to base an exception – not by a long shot.

[4]. Moreover, so the defendant contends, the plaintiff has omitted to plead the relevant facts and circumstances relied upon for the assertion that the universal

partnership agreement was implied, as well as the relevant facts and circumstances relied upon for the assertion that the said agreement was a tacit one. What is required to be pleaded, so the defendant asserts, is the catalogue of actions and specific conduct relied upon for the averment that the universal partnership agreement was an implied alternatively a tacit agreement.

[5]. Lastly, the defendant excepts to the particulars of plaintiff's claim on the basis that plaintiff failed to allege compliance with his obligations pursuant to and in terms of the alleged universal partnership agreement. This is so, despite the plaintiff having pleaded that the terms and conditions of the universal partnership agreement created obligations for both parties, which implies, so the defendant contends, that it is required of plaintiff to comply with the obligations he assumed and to plead to that effect, before he can claim relief on the basis of such an agreement.

[6]. By virtue of the foregoing, the defendant raised an exception that the particulars of claim lack averments necessary to sustain a cause of action against the defendant. Alternatively, it is the case of the defendant that the particulars of plaintiff's claim are vague and embarrassing, causing prejudice to her.

The Applicable Legal Principles

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

[8]. 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 defendant 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.

[9]. 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.

[10]. 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.

[11]. 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.

Applying these principles *in casu*

[12]. The onus is on the defendant to prove that, on every reasonable interpretation thereof, the particulars of plaintiff's claim are excipiable. The onus remains on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. The court must decide on the particular facts of each case whether the excipient will be prejudiced if compelled to plead to the particulars of claim in the form to which he or she objects.

[13]. As alluded to *supra*, the plaintiff's cause of action is based on the coming into existence of a universal partnership between him and the defendant. The essential requirements for the establishment of a universal partnership are the same as those for a partnership in general, namely: (1) that each of the partners bring something into the partnership, whether it be money, labour or skill; (2) that

the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit.

[14]. As correctly submitted by Ms Scott, who appeared on behalf of the plaintiff, this is exactly what was pleaded in the particulars of plaintiff's claim, including the *facta probanda* in support of this *causa*. Moreover, a universal partnership agreement does not of necessity require that the parties entered into an express contract. As is the case with any other contract, such an agreement can come and more often than not comes into existence by tacit agreement – that is by an agreement derived from the conduct of the parties. (*Butters v Mncora*¹). It could be tacit or implied from the facts, provided they admit of no other conclusion than that the parties intended to create a partnership. (*Festus v Worcester Municipality*²).

[15]. In *Christie: Law of Contract in South Africa*, the learned author points out, correctly, in my view, that a 'tacit contract' can also be described as an 'implied contract' or a 'contract by conduct'. There is therefore no merit in the very first issue raised by the defendant in her notice of exception. In any event, as I have already indicated, that point is not a ground on which to base an exception.

[16]. That then brings me to the defendant's complaint that the plaintiff ought to have pleaded facts and circumstances from which a tacit agreement can and should be implied. The case of the plaintiff is that there came into existence between the parties a universal partnership agreement in the form of a *societas universonum bonorum*, which denotes a partnership in relation to all of the property and assets owned by the partners and in terms of which they – as cohabitees – agree to pool their resources.

[17]. In such a case, all that a plaintiff is required to plead is that the parties have pooled their resources. From such conduct it can and should be inferred that the parties concluded a universal partnership agreement. This is exactly the case of the plaintiff *in casu*. He pleads full and precise details and particulars of all of the assets, which were previously owned by them as individuals, and which

¹ *Butters v Mncora* 2012 (4) SA 1 (SCA) at para 18;

² *Festus v Worcester Municipality* 1945 CPD 186 (C);

were pooled pursuant to the partnership for the benefit thereof. I therefore find myself in agreement with the submission by Ms Scott that the plaintiff did indeed set out in his particulars of claim how they had contributed towards the universal partnership and complied with their respective obligations.

[18]. That also takes care of the other ground of exception raised by the defendant, that being that the defendant failed to plead that he himself has complied with his obligations in terms of and pursuant to the universal partnership agreement.

[19]. For all of these reasons, the defendant's exception appears to be ill-advised and falls to be dismissed.

Costs

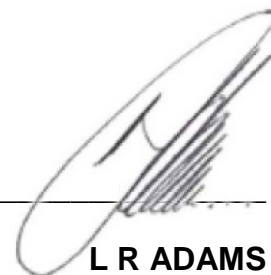
[20]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*³.

[21]. Applying this general rule, the defendant should be ordered to pay the plaintiff's costs of the exception and the exception application.

Order

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

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



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

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

HEARD ON:	24 th May 2022 – as a videoconference on <i>Microsoft Teams</i> .
JUDGMENT DATE:	29 th September 2022 – handed down electronically.
FOR THE PLAINTIFF / RESPONDENT:	Adv Amanda Scott
INSTRUCTED BY:	Gascoigne Randon & Associates, Edenvale, Germiston
FOR THE DEFENDANT / EXCIPIENT:	Adv A B Omar
INSTRUCTED BY:	Cari Du Toit Incorporated, Lonehill, Sandton