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: ***6th October 2022*** Signature: _____

CASE NO: 1746/2021

DATE: 6TH OCTOBER 2022

In the matter between:

MOBILE COMPLETE (PTY) LIMITED Plaintiff

and

RAM TRANSPORT (SOUTH AFRICA) (PTY) LIMITED Defendant

Coram: Adams J

Heard: 3 October 2022

Delivered: 6 October 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 14:00 on 6 October 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 – the court will accept, as true, the allegations pleaded by the plaintiff – it must be demonstrated that upon any construction of the particulars, no cause of action is disclosed – exception dismissed.

ORDER

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

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 damages on the basis of an 'insurance agreement', which related to and was ancillary to a 'Courier & Logistics Services Agreement' concluded between the parties on 3 April 2019.

[2]. In its amended particulars of claim, the plaintiff pleads that the 'insurance agreement', concluded between the parties on 8 April 2019, was constituted by a series of emails between them. In terms of this agreement, so the plaintiff avers, the defendant agreed to provide insurance cover from 9 April 2019 in respect of the courier services rendered by the defendant to the plaintiff pursuant to the aforementioned 'Courier & Logistics Agreement' of 3 April 2019.

[3]. The insurance was to be provided, so it is pleaded by the plaintiff, on the following terms and conditions: the plaintiff would put the cost price / replacement value on the waybill for the insurance amount; all claims would be paid exclusive of value added tax; no excess fee would be charged on claims; the plaintiff would provide an invoice for the items involved in a claim; should the plaintiff solicit the defendant's goods in transit ('GIT') liability cover, a loss letter would be sent and the defendant would then request an invoice from the plaintiff for payment of the claim; all claims were to be processed and paid as soon as all documents were received and signed off by the managing director of the defendant; and the insurance premium would be an amount of 0.4% of the value of the goods couriered from time to time; with payment of the insurance premiums being

payable after the courier services had been rendered and thirty days after a month-end statement was provided by the defendant.

[4]. This 'insurance agreement', as pleaded by the plaintiff in its particulars of claim, appears to fly in the face of the written 'Courier & Logistics Agreement', in terms of which the defendant provided to the plaintiff logistics and courier services and which, from 3 April 2019, seemingly regulated the contractual relationship between the parties. This agreement, a copy of which is annexed to the particulars of claim, is common cause, and provides that should the plaintiff require insurance, same shall only become applicable in terms of a separate quotation which is to be reduced to writing and incorporated in a separate agreement signed by both parties. The agreement further provides that such liability option shall only be available to a customer who has completed an application to enter a Master Logistics Agreement ('MLA') and a Service Level Agreement ('SLA') which application was to be successfully approved and signed by both the plaintiff and the defendant in writing.

[5]. The plaintiff gets around these requirements by pleading that the initial 'Courier & Logistics Agreement' dated 3 April 2019, which came into existence after the defendant accepted its (the plaintiff's) application to enter into such agreement, was in fact also an MLA as well as an SLA. In the exception the defendant argues that that cannot be so. I'll revert to this aspect of the matter shortly.

[6]. In the alternative, the plaintiff pleads the aforegoing terms and conditions were for the benefit of the defendant, who waived its rights under those terms.

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

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

[9]. 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.

[10]. 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.

[11]. 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.

[12]. Having said the aforegoing, 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.

[13]. That then brings me back to the grounds on which the defendant bases its exception.

[14]. Firstly, so the defendant contends, in terms of the initial agreement between the parties, if the plaintiff intended applying for the defendant's insurance cover, it (the plaintiff) was required to contact the defendant's insurance division, who would conduct a risk assessment in relation to the plaintiff

and the courier services to be rendered at its instance. Accordingly, so the exception reads further, the plaintiff agreed that no insurance or other form of liability would be extended to it and the defendant would not be liable for any loss, whether such loss arises in contract, delict or otherwise.

[15]. This agreement, so this ground of exception is concluded, contains the entire and only agreement between the plaintiff and the defendant. And therefore, as per clause 6.1, under the heading 'Risk – No Liability', the defendant only accepted liability for any physical loss of or damage to a shipment resulting from the gross negligence of the defendant, occurring while the Shipment is in the actual possession of the defendant, which shall be deemed not to include any period of time the shipment is in the care, custody or control of any designated private or commercial air carrier or airlines.

[16]. In sum, the first ground of exception is that, having regard to the aforegoing provisions of the 'entire and only agreement' between the parties, the plaintiff was required to plead that: (1) it completed an application to conclude a MLA and a SLA with the defendant; (2) it contacted the defendant's insurance division and requested and was furnished with a risk assessment; and (3) it applied for and was granted a separate quotation which was.

[17]. The plaintiff's riposte to this ground is that it did in fact plead compliance with these conditions – it pleaded (rightly or wrongly) that the 'Courier and Logistics Agreement' doubled as the MLA and the SLA. Whether this is in fact so is irrelevant, because, for purposes of an exception, the allegations pleaded must be accepted as true. Furthermore, so the plaintiff submits, they have pleaded the other requirement to bring into existence the insurance cover, notably the agreement on a quotation in respect of such insurance cover. This was incorporated in the trail of emails between the parties.

[18]. I agree with these submissions on behalf of the plaintiff. The point is simply that the particulars of plaintiff's claim can reasonably be interpreted as sustaining a cause of action based on the provisions of the original 'Courier & Logistics Agreement'. In other words, plaintiff has pleaded that an 'insurance agreement' as contemplated by the said agreement had been concluded. The defendant says

that that is patently false. I reiterate that, in considering the defendant's exception that the particulars of claim do not sustain a cause of action, the court has to accept, as true, the allegations pleaded by the plaintiff, which, in my view, does indeed disclose a cause of action. Moreover, it cannot be said that upon any construction of the particulars of claim, no cause of action or defence is disclosed.

[19]. This first ground of exception should therefore fail.

[20]. The second ground of exception raised by the defendant relates to the fact that there is a contradiction in the plaintiff's cause in that at the outset the plaintiff indicated, in writing, that it did not require any insurance or liability for goods in transit. The plaintiff fails to allege, so the defendant avers, that it required liability insurance when it completed its application to enter the agreement initially. This submission is misguided. It is the case of the plaintiff that subsequent to the conclusion of the initial agreement, the insurance agreement was entered into. Therefore, this ground of exception should also fail.

[21]. Lastly, and in relation to the alternative cause of action based on the defendant's waiver of the conditions imposed by the original agreement, which were for its benefit, the defendant complains that the plaintiff had failed to allege that the defendant decided to abandon its rights and conveyed that decision to the plaintiff. This ground of exception is stillborn, simply because these allegations are implicit in the averment by the plaintiff that the defendant 'waived' its rights in terms of these conditions. Moreover, this point seems to me to be of an overly-technical nature.

[22]. In sum, the onus is on the defendant to prove that, on every reasonable interpretation thereof, the particulars of plaintiff's claim are excipiable. The defendant has failed to discharge such onus.

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

Costs

[24]. 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

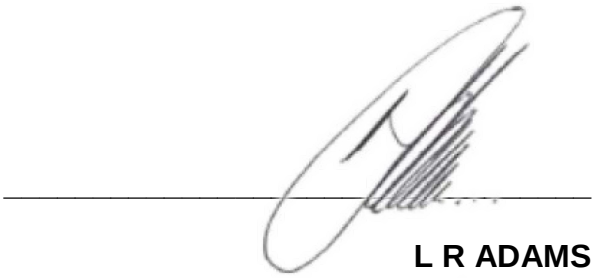
good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[1].

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

Order

[26]. 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

HEARD ON:	3rd October 2022
JUDGMENT DATE:	6th October 2022 – handed down electronically.
FOR THE PLAINTIFF / RESPONDENT:	Advocate Danie Combrink
INSTRUCTED BY:	Moumakoe Clay Incorporated, Fourways
FOR THE DEFENDANT / EXCIPIENT:	Advocate Adam Berkowitz
INSTRUCTED BY:	Werksmans Attorneys, Sandton

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