IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 13765/13

DATE: 31/3/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

…….. ……..

DATE **SIGNATURE**

In the matter between:

PETROSITE (PTY) LTD Plaintiff

and

HAPPY EZEKIEL SEGAGE 1st Defendant

GERDA KELEBOGILE SEGAGE 2nd Defendant

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] On 05 March 2013, Plaintiff issued summons against the defendants for payment of an amount of R3,526,523.60 (Three million five hundred and twenty six thousand five hundred and twenty three rand and sixty cents)) plus interest *at* the prime rate and costs on the attorney and own client scale.

[2] The plaintiff's claim against the defendants arises from a written agreement in terms of which the latter acknowledged their indebtedness to the plaintiff and bound themselves and their joint estate jointly and severally liable to repay to the plaintiff an amount of R2 626 316.80 (Two million six hiundred and twenty six thousand three hundred and sixteen rand and eighty cents), being money paid and received for both their direct business and personal benefit paid into an Absa banking account held by Shell South Africa Marketing (Pty) Limited on 29 October 2009.

[3] In paragraph 7 of the particulars of claim, plaintiff alleged that the defendants failed to repay the total amount or any amount at all . The amount claimed represent the total outstanding balance as at 30 April 2010 in terms of the Certificate of Balance signed by the plaintiff's director.

[4] Defendants filed a plea and two counter-claims on 27 May 2013. They raised the following special pleas that I will briefly mention because they are not relevant for present purposes.

(a) The acknowledgement of debt is an ancillary to a management agreement signed by the parties. First defendant is owner of Jesmic garage. Jesmic garage is the recepient of the loan and as such it should have been joined in the proceedings;

(b) the defendants have consented to jurisdicton of the Magistrates court in the acknowledgement of debt, as such, the High Court has no jurisdiction and

(c) The claim is against defendants and their joint estate, however, by its own admission, plaintiff has paid the money to defendant and Jesmic garage which has not been joined in the action.

[5] On 08 July 2013 plaintiff gave defendants notice in terms of Rule 23 and 30 of its intention to except to the plea and counter claims on the basis that it lacks averments necessay to sustain a cause of action , altenatively that it is vague and embarasing.

[6] On 23 July 2013, Defendants filed a notice of intention to amend its plea and counter claim . On 13 August 2013, Plaintiff filed a notice of objection to the intended amendment. Plaintiff also filed a notice of exception. On the same day. There was no application to amend the plea before me. Ms Williams tried to persuade me to hear her out in this regard, an invitation I duly declined because in my view, it would have been prejudicial to the plantiff. An application for amendment is accompanied by an affidavit explaining the resons why the amendment is sought. The plaintiffs would have been entitled to answer thereto.

THE EXCEPTION

[7] Plaintiff has raised two complaints against the defendants' plea and counterclaims.

[8] The first complaint relates to the the first counterclaim[1] in terms of which the defendants' claim is that the plaintiff

> *"1……..……render a full account supported by vouchers of both the Jesmic and Carousel filling stations as well as for immpovable properties ceded to them*

[1] Paragraphs 47 – 55 of defendant's plea

2. debate of the said accounts

3. payment and or set-off in favour of the Defendants of whatever amounts appear to be due to the Defendant upon debate of the account"

[9] The relief claimed in the first counte-claim is preceded by paragraphs 50 .1 to 50.10, which are a word by word reproduction of the terms of the Management Agreement [2]allegedly entered between plaintiff and the defendants.

[10] The nub of the exception in this regard is in paragraphs 5 and 6 of the notice exception and reads as follows:

" 5. The defendants, however fails to state whether as at the time of takeover, were there any amounts and how much of it, owing and due to the defendants, the plaintiff received, which ought to be set off against the capital borrowed to them.

[2] Annexure HES 1

6. The Defendants further failed to set out a legal or factual basis for their entitlement to the accounting, debatement and payment or set-off against the loaned amount, which they seek. The counter-claim fails to set out averments necessary to sustain a cause of action and is vague and embarassing. The counter-claim also fails to comply with the requirements of the Uniform Rules of Court and thus also renders them an irregular step"

[11] The second complaint is directed at the second claim in reconvention that reads as follows:

" ***AD DEFENDANTS 2ND CLAIM IN RECONVENTION***

60. The Defendants repeat paragraphs 25 to 28 of its claim in reconvention

61. The defendants repeat paragraph 5 of the Plaintiff's claim in convention.

62. The two agreements signed by the parties are mutually destructive, in so far as the management agreement eventually sets off the debt and simultaneously the acknowledgement of debt increases the debt.

63. It is trite that a contract is interpreted against the party who drafted and or caused it to be drafted.

64. It is objectively impossible for the Defendants to perform in terms of both agreements entered into.

65. None-the-less the Defendants performed in terms of the management agreement in a bona fide effort to extinguish the debt owed to the plaintiff.

66. The defendants plead further that both contracts cannot be enforced due to their coontradictory effects.

67. Wherefore the defendant prays that:

1. That both the acknowledgement of debt as well as the Management agreement be set aside.

2. The Plaintiff renders a fulll account supported by vouchers of both the Jesmic and Caousel filing stations as well as for the immpovable properties ceded to them.

3. Debate of the said accounts.

4. Payment and or set-off in favour of the Defendants of whatever amounts appear to be due to the Defendant upon debate of the account".

12. Paragraphs 25 to 28 of the defendants' claim in reconvention read as follows:

" *25.* ***AD PARAGRAPH 5.1 THEREOF***

The contents of this paragraph are dnied, the Defendant pleads further that in terms of the management agreement, particularly paragraph 1.2 thereof, the 1st Defendant, as the OWNER AND MANAGING MEMBER of Jesmic Motors CC, has in his personal capacity received a loan amount of R2. 626 316, 80 from Petrosite (the plaintiff).

26. ***AD PARAGRAPH 5.2 THEREOF***

The contents of this paragraph are denied, the Defendants

repeat the allegations made in 5.1 supra.

27. ***AD PARAGRAPH 5.3 THEREOF***

The contents of this paragraph are denied.

28. ***AD PARAGRAPH 5.4 THEREOF***

The contents of this paragraph are denied."

13. Paragraph 5 of Plaintiff's claim in convention is actually the terms of the Acknowledgement of debt agreement.

14. The second complaint reads as follows:

" *7. The Defendants state in paragraph 60 that they repeat the contents of paragraphs 25 to 28. The contents of paragraphs 25-28 refers to completely different items and as such have no relation and meaning at all, as such they cannot be a basis for what is sought to be relied on by the Defendants in paragraph 60. Accordingly, the Defendants are requested to particularise what they intend to refer to in paragraph 60.*

8. The Defendants in paragraph 61 state that they repeat the contents of paragraph 5 of the Plaintiff's claim in reconvention.

They further add in paragraph 62 that the two referred agreements are mutually destructive or impossible to perform by the Defendants. The Defendants have failed, as they are required in terms of the Rules, to specify all such particulars for which they allege.

9. As a result the Defendans Plea and Counter-claim is vague and embarrassing and fails to set out particulars to sustain a cause of action and a defence. Further, the Plea and Counter-claim fails to comply with the requirements of rule 18 of the uniform rules of court and thus renders them as an irregular step"

SUBMISSIONS

Plaintiff

[15] In his written and oral argument, Mr. Nguntshane highlighted the following facts ex facie the plea and counter-claims filed by the defendants:

(a) They admitted entering into the acknowledgement of debt agreement, but deny its contents, except for their domicilium citandi et executandi.

(b) They claim that plaintiff should render an account, debate such account, make payment and set-off their debt. However, there is no factual or legal basis for this claim.

(c) They rely on the terms of the acknowledgement of debt as a basis for their second counter-claim. However, as stated above, save for admitting their address, all terms and conditions of this agreement were expressly denied in the plea in convention.

[16] Mr. Nguntshane submitted further that plaintiff is not able to file a plea to the counter-claims because it is unable to see what case it is being called upon to meet.

(a) Before a duty to account arises, there must be an allegation that plaintiff received certain stock from the defendant. No such allegations are made.

(b) Defendants rely on the terms of the Management Agreement as a basis for their first counter- claim (actually reproduced them word by word). However, they do not allege any compliance by palintiff and as such a breach by plaintiff of any term or condition in the agreement.

[17] In paragraph 42 of their plea, Defendants make a bare denial of the contents of paragraph 7 of the particulars of claim wherein plaintiff makes an allegation that they failed to repay the total amoun in terms of the acknowledgement of debt. It is not clear what the basis of the denial is, whether they have paid or not.

Mr. Nghuntsane submitted further that the second claim in reconvention is entirely meaningless . The defendants effectively say that they have a claim based on the denials they have made with regard to the contents of the acknowledgement of debt agreement.

[18] He referred the court to authority for the legal principle that an exception to particulars of claim on the basis that they are vague and embarrassin strikes at the root of the cause of action[3]. Furthermore, the grounds that the defendants rely on for their counter-claim do not support and cannot sustain the cause of action sought to be advanced.

Defendants

[19] In her heads of argument, Ms Williams argued that the relationship between the parties is regulated by the agreements defendants rely on in their claim in reconvention.

[3] such as Jowell v Bramwell-Jones and Others 1998(1) SA 836 (W) at 899 F-G and 9021-903D

[20] In paragraphs 2.1.2.3 and 2.1.2.4 of her her heads of argument, she submitted the following:

" 2.1.2.3 The mentioned assets were immediately ceded to the excipients, together with the bank account at Standard Bank.

2.1.2.4 The excipients took immediate possession of all the assets including the following;

a) SHELL JECMIC SERVICE STATION IN THEMBA

b) SHELL CAROUSEL IN HAMMANSKRAAL

c) ERF NO 589 KUDUBE UNIT D, NORTH WEST PROVINCE

d) ERF NO 590 KUDUBE UNIT D, NORTH WEST PROVINCE

e) ERF NO 812 KUDUBE UNIT D, NORTH WEST PROVINCE

f) PORTION 50 OF FARM NO.65 WITGATBOOM, NORTH WEST PROVINCE

g) PORTION 51 OF FARM NO. 65 WITGATBOOM, NORTH WEST PROVINCE

h) UNIT 1 AND W1 ANNLIN 763

To the full excluson of the Respondents with the intent of

extinguishing the oan between the parties.

[21] In paragraph 22 of her heads of argument, Ms Williams submitted that *"The second cause of complaint is based on a typing error, said error was sought to be rectified in the notice of amendment objected to by the excipient."*

[22] When asked by the court why defendants denied the contents of the acknowledgement agreement which they do not deny entering into, Ms Williams was adamant that defendants were entitled to plead the denials . According to her, it was sufficient because in the claim in reconvention they have attached the Management Agreement, which , in her view should be read with the Acknowledgement of Debt Agreement.

[23] Ms Williams went on to argue that clause 1.3 of the Management Agreement lays the basis for the counterclaim because it provides that the profits shall be set off to settle the debt.

[24] I must say I was much astonished by Ms William's reasoning and argument, not only because she was arguing outside her papers, but also because of her attitude towards the court.

At some point Ms Williams told me that she ***"insists"*** that her submissions were correct. This was in response to questions being put to her about the rules of pleading.

[25] I have perused the plea and counter-claims filed by the defendants (signed by Adv.T. Williams and defendants' attorney) several times, but I could not find any allegation that:

[25.1] Certain properties belonging to the defendants were ceded to the plaintiffs with the intetion to settle the debt in the Acknowledgement of Debt Agreement as Ms Williams claimed in her heads of argument. She conceded though that these are the averments that should have been pleaded.

[25.2] Any stock was handed to the plaintiff and its values.

[25.3] Any reason why defendants deny the contents of the Acknowledgement of Agreement, that they admit signing.

LEGAL PRINCIPLES

[26] In considering an exception , the court must look at the pleading excepted to as it stands, no facts outside those stated in the pleadings can be brought into issue[4].

[27] Rule 18(4) of the Uniform Rules of Court provides as follows: *"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[5] to enable the opposite party to reply thereto."*

[28] Ambiguity on its own is not sufficient. There must be evidence that the opposing party will be seriously prejudiced if the relevant portions in the declaration are allowed to stand. The vagueness must relate to the cause of action[6]

[4] **Minister of Safety and Security vs Hamilton** 2001 (3) SA 50 (SCA) at 52 G-H.

[5] **Trope and Others v South African Reserve Bank** (641/91) [1993] ZASCA 54; 1993 (3) SA 264 (AD); [1993] 2 All SA 278 (A) (31 March 1993)

[6] **Carelsen v Fairbridge , Ardene & Lawton** 1918 TPD 306 at 309, approved in amongst other cases; **Liquidators Wapejo Shipping Co. Ltd v Lurie Bros** 1924 AD 69 at 74

[29] In the Trope case[7], Macreath J considered the meaning of "vague and embarrassing" in the context of exceptions and the nature of the enquiry that the court should undertake.

> *"No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading.*
>
> *The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law.*
>
> *An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the Excipient is prejudiced (Quinlan v MacGregor 1960 (4) SA 383 (D) at 393E-H). As to whether there is prejudice, the ability of the Excipient to produce an exception-proof plea is not the only, nor indeed the most important, test - see the remarks of Conradie J in Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated.*

[7] at t 211

Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing - see Parow Lands (Pty) Ltd v Schneider 1952 (1) SA 150 (SWA) at 152F-G and the authorities there cited.

It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading."

CONCLUSION

[30] The defendants have not laid a basis or set out facts to sustain the relief sought in the first counter-claim, accordingly , the exception in the first ground of complaint must succeed.

[31] Counsel for the defendant has conceded that *"The second cause of complaint is based on a typing error, said error was sought to be rectified in the notice of amendment objected to by the excipient."*

[31.1] In my view, it is more than a typing error because allegations are made that the two agreements entered into between the parties are "*mutually destructive in so far as the management agreement eventually sets off the debt and simultaneously the acknowledgement of debt increases the debt*".

[31.2] Other than quoting the claused in the management agreement, this is all that has been pleaded to support the relief of set-off, debatement and accounting.

[32] The exception in the second ground of complaint must accordingly succeed too.

[33] Although no exception was specifically raised against the plea in convention, it became clear during argument that the denials with regard to the contents of the acknowledgement of debt agreement lack particularity to enable the plaintiff to know the basis of defendants' defence in this regard.

[34] The defendants admitted in paragraph 24 of the plea that they entered into the acknowledgement of debt agreement, however, in

paragraphs 25 to 40 they denied all the material terms of the agreement. In paragraphs 41 and 42 of the plea, defendants also made a bare denial in response to the allegation that they failed to repay the loan and were in arrears.

[35] Accordingly, paragraphs 25 to 42 of the plea lack averments to sustain a defence .

[36] Under the circumstances, I am satisfied that the exceptions are good and well taken, and I make the following order;

[36.1] The exceptions are upheld;

[36.2] The defendants's first and second claims in reconvention are hereby set aside.

[36.3] Paragraphs 25 - 42 of the defendants plea in convention are hereby set aside;

[36.4] The defendants are granted leave to amend their claims in reconvention as they may be advised , and their plea in convention only to the extent that it has been set aside within 15 days of this order.

[36.5] The defendants are ordered to pay costs jointly and severally, one paying the other to be absolved.

MAKHUBELE AJ

Acting Judge of the High Court

APPEARANCES

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