

IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]



CASE NUMBER: 63339/2014

In the matter between :

31/8/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. ✓
31/8/2016	
DATE	SIGNATURE

SA TAXI DEVELOPMENT FINANCE (PTY) LTD

APPLICANT

and

SERAPELO, MONYANE MICHAEL

RESPONDENT

In re:

SERAPELO, MONYANE MICHAEL

PLAINTIFF

and

BRAVOPIX 353 t/a FIKILE MOTORS

FIRST DEFENDANT

SA TAXI DEVELOPMENT FINANCE (PTY) LTD

SECOND DEFENDANT

JUDGMENT

[1] The Second Defendant excepted on grounds thereof that the Plaintiff's particulars of claim are vague and embarrassing. I must firstly raise another issue. I am in the uncomfortable position that I was the cause of lost time in that I delayed unduly delaying in handing down judgment herein. I profoundly apologise to the parties for the delay. I feel constrained to give an explanation for at least some of the unfortunate delay in giving judgment: during argument I intimated to Mr Molentze who argued the matter on behalf of the Applicant (Second Defendant in the main dispute) that I am not altogether persuaded that the exception ought to succeed. I took time to consider the issue again. My term as acting judge ended at the end of the next week after the argument was heard. Due to other commitments this judgment was not finalised expeditiously.

[2] The Plaintiff (Respondent) issued summons against the Excipient (in the papers called Applicant) who is the Second Defendant in the action. For clarity purposes I will refer to the Excipient/Applicant which is SA Taxi Development Finance (Pty) Ltd as the "Second Defendant" and to the Respondent as the "Plaintiff". The First Defendant did not take part in the

exception proceedings and will, insofar as it might be necessary to refer to it, be referred to as the "First Defendant".

- [3] The Plaintiff instituted action against the First Defendant which is a car dealership and against the Second Defendant which is a registered credit provider in terms of the National Credit Act.
- [4] Of significance is the fact that in paragraph 3.3 of the particulars of claim the Plaintiff alleges that the Second Defendant is joined "solely to this process to give it notice of this action". At the hearing of the exception, only the Second Defendant appeared in the person of Adv Molentze. I was assured that there was proper service of all the documents on the Plaintiff against whose particulars of claim the exception is directed. From the court file it does not appear as if the First Defendant entered any notice of appearance to defend.
- [5] The particulars of claim allege in paragraph 4 thereof that the Plaintiff entered into a partly written and partly oral agreement with the First Defendant. In paragraph 2.1 of the particulars of claim the Plaintiff elected to refer to the First Defendant in the particulars of claim as "the Dealership".
- [6] The Plaintiff then alleges that it entered into a partly written and partly oral agreement with the Dealership for the purchase of a certain Toyota

Quantum motor vehicle.

- [7] The Plaintiff then alleges that the oral terms of the agreement *inter alia* were that the Plaintiff would pay the Dealership (the First Defendant) the purchase price by financing the said purchase price through the Second Defendant. Further terms are alleged that are not relevant for present purposes.
- [8] The Plaintiff then alleges that it entered into a hire-purchase agreement with the Second Defendant and he further alleges that he accordingly discharged his obligations to the Dealership (the First Defendant) by making timeous payment of the purchase price and a copy of the hire-purchase agreement is attached to the particulars of claim as Annexure "POC1".
- [9] The Plaintiff then alleges that the Dealership (First Defendant) breached its obligations to the Plaintiff in certain respects. The Plaintiff then further alleges that the defective taxi was returned by the Plaintiff to the Dealership and that the Dealership "under the auspices" of the Second Defendant provided the Plaintiff with a replacement taxi.
- [10] However, in terms of the particulars of claim the replacement taxi also did not comply with the alleged terms of the agreement between the Plaintiff and the Dealership resulting therein (as alleged in paragraph

15 of the particulars of claim) that the Plaintiff suffered contractual damages as a result of the Dealership's breach of contract. The amounts of the damages are stated in paragraph 15 of the particulars of claim. The items of damage are R252 470.00 being the amount that was paid to the Dealership as the purchase price. Secondly R211 837.75 being the amount owed by the Plaintiff to the Second Defendant as interest in terms of the hire-purchase agreement. Thirdly R3 705.00 which amount is in lieu of service fees owed to the Second Defendant in terms of the hire-purchase agreement and fourthly a sum of R587 315.43 being lost profits suffered by the Plaintiff as a result of the Dealership's (i.e. the First Defendant's) breach of contract.

[11] From paragraphs 16 to 21 a claim is formulated under the Consumer Protection Act 68 of 2008 that throughout clearly refers thereto that the Dealership breached the agreement between the Plaintiff and the Dealership (the First Defendant).

[12] In particular in paragraph 18 it is alleged that the Dealership (the First Defendant) refused and/or elected not to properly discharge its duties to the Plaintiff.

[13] Then in paragraph 21 the Plaintiff alleges that "the Defendant" failed, refused or neglected to pay the Plaintiff's contractual damages as framed in paragraph 15.

[14] In paragraphs 22 to 29 a claim on the so-called aedilician actions for latent defects, alleging in the main part of paragraph 22 that "the Defendant" expressed (sic) the absence of defects and/or implied the presence of qualities that were lacking in the taxi. The Plaintiff then further, in paragraphs 23, 24, 25, 26, 27 and 29 clearly refers to the Dealership (the First Defendant) as the party liable for the damages.

[15] In paragraphs 30 to 36 a second aedilician claim is formulated. In these paragraphs there is a clear reference to the Dealership as being the party that breached the agreement.

[16] In paragraph 37 it is then alleged that "the Defendant's breach" caused the Plaintiff to suffer the damages listed in paragraph 15. The introductory part of the prayers reads that the Plaintiff prays for judgment against "the Defendant" under the alternative claims A, B and C.

[17] A notice in terms of Rule 23(1) was directed to the Plaintiff by the Second Defendant to remove the alleged vagueness and embarrassing nature of the particulars of claim. The grounds for the complaint are:

"(1) In citing the second defendant in paragraph 3 of the particulars of claim, the plaintiff pleads inter alia, as follows:

'3.3 A registered credit provider in terms of the National Credit

Act, and is joined solely to this process to give it notice of this action.'

- (2) In the result, the plaintiff pleads that no relief is to be sought against the second defendant in the action.*
- (3) That pleading notwithstanding, the plaintiff refers in paragraphs 15 and 22 of its particulars of claim and in the prayers to 'the defendant'.*
- (4) The second defendant does not know whether a reference to 'the Defendant' as aforesaid is a reference to it or not.*
- (5) In the circumstances the second defendant is prejudiced and embarrassed in pleading to the particulars of claim."*

[18] Thereafter as a result of the failure of the Plaintiff to react to the Rule 23(1) notice, the Second Defendant thereafter excepted against the Plaintiff's particulars of claim on the same grounds as are quoted above. The exception prays that the exception be upheld with costs and that the Plaintiff's particulars of claim be struck out.

[19] The question thus is whether the references to "the Defendant" without clearly distinguishing between the First Defendant and the Second Defendant indeed causes prejudice and embarrassment to the Second Defendant resulting therein that it cannot plead to the particulars of claim.

[20] Mr Molentze on behalf of the Second Defendant argued that if the exception should be dismissed, the Second Defendant would not know how to plead. He therefore requested that the exception be upheld in the terms applied for in the exception and he also asked for the costs of the exception.

[21] In the judgment of **Screening & Earthworks (Pty) Ltd and Another v Capital Outsourcing Group (Pty) Ltd; Capital Outsourcing Group (Pty) Ltd v Screening & Earthworks (Pty) Ltd** [2008] (1) All SA 611 (B) the test when a pleading is vague and embarrassing as stated in Erasmus, Superior Court Practice (Service 27) B(1) – 152 is quoted. I summarise the test as follows:

- (a) In each case the Court is obliged to first of all consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning.
- (b) If there is vagueness in the sense stated, then the Court is obliged to undertake a quantitative analysis of such embarrassment as the excipient can show it caused him or her by the vagueness complained of.
- (c) In each case a ruling must be made whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form as it stands.

- (d) The ultimate test is whether the excipient is prejudiced.
- (e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.
- (f) The excipient must make out his or her case for embarrassment by reference to the pleadings alone.

[22] In this instance the vagueness complained of is that the pleading is capable of more than one meaning namely in paragraph 3.3 the allegation is made that the Second Defendant is only cited for purposes of notice. On the other hand in paragraphs 15, 22 and 37 there is a reference to "the Defendant" without as such specifying whether these references are references to the First Defendant, the Second Defendant or both of them. Therefore one has to conclude that there is vagueness in the sense of a possibility of more than one meaning to possibly be ascribed to the term "Defendant".

[23] The question then is whether the Second Defendant is embarrassed to the extent that it suffers prejudice, the prejudice being that the Second Defendant would not be in a position to plead to the particulars of claim.

[24] The Second Defendant carries the onus of proof to persuade me that it suffers prejudice to the extent that it cannot plead to the particulars of claim.

[25] In paragraph 3.3 it is clearly stated that the Second Defendant is cited solely for purposes of giving notice of the action to the Second Defendant.

[26] In paragraph 4 the allegation is made that the Plaintiff and the Dealership (i.e. the First Defendant) entered into a partly written and partly oral agreement. Paragraph 5 then sets forth the oral terms of the oral agreement between the Plaintiff and the First Defendant. Throughout the particulars of claim the allegation is made that the Dealership breached the terms of the agreement (i.e. the oral agreement between the Plaintiff and the First Defendant). In paragraph 15 the allegations are summarised and again it is clearly stated that the Dealership (i.e. the First Defendant) is in breach of the agreement with the Plaintiff.

[27] In paragraph 15 the contractual damages suffered is calculated again with specific reference thereto that the damages were suffered as a result of the Dealership's (i.e. the First Defendant's) breach of contract. In fact paragraphs 15.2 and 15.3 of the particulars of claim emphasises the fact that the First Defendant is the target of the particulars of claim by referring thereto that the Plaintiff owes the Second Defendant interest in the sum of R211 837.75 and service fees of R3 705.00.

- [28] Similarly paragraphs 16 to 20 can only be read to say that the Plaintiff directs its attack regarding the claim formulated in these paragraphs to the Dealership (i.e. the First Defendant).
- [29] The allegation then in paragraph 21 that "the Defendant" failed to pay the Plaintiff's contractual damages as framed in paragraph 15 creates a vagueness in the sense that it does not clearly distinguish between the First Defendant and the Second Defendant. However, having regard to the full contents of the particulars of claim and the clear formulation thereof as being directed against the First Defendant, simply leaves no doubt that "the Defendant" referred to can only be one party and that is the First Defendant.
- [30] Similarly paragraph 22 then again creates vagueness in that it refers in the main part to "the Defendant". Reading the subparagraphs of paragraph 22 and paragraph 23, 24, 25, 26, 27 and 28 together with the main part of paragraph 22 it is clear that the reference to "the Defendant" in the main part of paragraph 22 can only be a reference to the First Defendant and can never be a reference to the Second Defendant. Paragraphs 30 to 36 then clearly again refers to the First Defendant by reference to the term "the Dealership" and all these allegations are clearly directed to the First Defendant and never to the Second Defendant.

[31] Summing up then in paragraph 37 where it is alleged that the Plaintiff as a result of "the Defendant's breach has suffered damages as listed in paragraph 15" can again only be interpreted in one way, namely that the allegation is made that the First Defendant was the cause of the damages suffered by the Plaintiff. It is simply not open to understand the reference to "the Defendant" in paragraphs 21, 22 (the main part of paragraph 22), 37 and in the heading to the prayers as referring to any other party than the First Defendant.

[32] In the circumstances I find that the Plaintiff's particulars of claim is not vague and embarrassing to the extent that the Second Defendant cannot plead to the particulars of claim. I find that on a proper reading thereof the references to "the Defendant" are clearly references to the First Defendant and never to the Second Defendant. In the circumstances the exception must be dismissed.

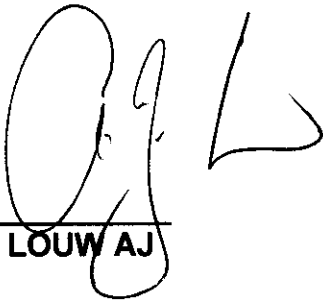
[33] Costs of the exception are prayed for in the exception itself and Mr Molentze in argument confirmed that he seeks a costs order in favour of the Second Defendant.

[34] There was no appearance at the hearing on behalf of the Plaintiff. He did not act on the Second Defendant's notice in terms of Rule 23(1) or the exception itself. The Plaintiff also did not attend the hearing and did not ask for costs against the Second Defendant. Thus the Plaintiff

left it to the Second Defendant to persuade a court that the exception is sound and should succeed. The Second Defendant could not so persuade me. In the circumstances I regard it as fair that no costs order be made.

[35] I therefore order as follows:

1. The Second Defendant's exception is dismissed.
2. No costs order is made.



AJ LOUW AJ