IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 27376/2017

(1) REPORTABLE: YES ✓
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO
(3) REVISED: YES ✓

07/02/2019 DSMolefe
DATE SIGNATURE

Keith Ackerman — **First Plaintiff/First Respondent**

Marone Ackerman — **Second Plaintiff/Second Respondent**

and

Gideon Jacobus Schmidt — **Defendant/Excipient**

JUDGMENT

MOLEFE J

[1] The defendant (excipient) in this application, excepts to the averments in the plaintiffs' (respondents') particulars of claim on the basis that same is vague and embarrassing, alternatively on the basis that it lacks averments which are necessary to sustain a cause of action. The plaintiffs oppose the exception.

[2] On 19 April 2017, the plaintiffs instituted an action against the defendant for payment in the sum of R276 781.82, being the value added tax (VAT) amount paid to the defendant. The plaintiff's claim is based on the defendant's undue enrichment at the expense of the plaintiffs when affecting certain building works for the plaintiffs. The plaintiffs allege that the defendant is not a registered VAT vendor and was not entitled to charge VAT, and was therefore unduly enriched.

[3] On 5 October 2017, the defendant delivered a notice of intention to raise an exception and for the plaintiffs to remove a cause of the complaint in terms of rule 23[1], in terms of which he averred that the particulars of claim is vague and embarrassing, alternatively that it lacks averments necessary to sustain a cause of action. The plaintiffs did not amend the particulars of claim and a notice of exception was subsequently delivered to the plaintiffs on 8 November 2017, which exception is before me.

First Ground of Exception

[4] In paragraph 4 of the particulars of claim, the plaintiffs pleaded that during or about February 2015 to November 2015, they personally concluded a partly written, partly oral agreement with the defendant ("the Elarduspark agreement"). The written portion of this agreement consists of a large number of e-mail, correspondence between the parties and the plaintiffs rely on some fifteen (15) emails as the alleged written component of the Elarduspark agreement.

[5] Defendant's counsel[2] submits that the emails on face value, contains information in relation to matters unrelated to the contractual terms and/or

---

[1] Uniform Rules of Court
[2] Advocate N Marshall

contractual amendments which must be specifically pleaded. It was further submitted that even though the plaintiffs aver that the Elarduspark agreement concluded with the defendant was partly oral, they failed to plead and/or specify any of the oral terms of the agreement, and when the alleged oral components of the agreement were concluded.

Second ground of exception

[6] In paragraph 6 of the particulars of claim, the plaintiffs plead that during or about February 2015 to November 2015, they personally concluded a partly written, partly oral agreement with the defendant ("the Lonehill agreement"). The written portion of this agreement consists of a large number of email correspondence between the parties, and the plaintiffs purports to rely on forty-three (43) emails as the written component of the Lonehill agreement.

[7] Defendant's counsel submits that it is essential for the plaintiffs to have pleaded the various items relied upon instead of merely referring the defendant to numerous emails exchanged between the parties, some of the emails not even related to the contract. It was further submitted that even though the plaintiffs aver that the Lonehill agreement was partly oral they failed to plead and/or specify any of the alleged oral terms and when the alleged oral components of the agreement were concluded.

Third Ground of Exception

[8] The cause of action is purportedly based on various payments which were made to the defendant, in relation to the two agreements as pleaded. In paragraph 12 of the particulars of claim, the plaintiffs plead that "*pursuant to the Elarduspark*

agreement and the Lonehill agreement, the plaintiffs effected the following payments to the defendant during the period 3 March 2015 to 24 October 2015. . ." Payments allegedly made to the defendant is pleaded, without distinguishing which payments were made in relation to which of the two agreements.

[9] Counsel for the defendant argues that this renders it difficult to ascertain if the payments relate to the agreement/s at all, or if the amounts were paid for another *causa* which is unrelated to the two agreements pleaded.

[10] Before dealing with the exception, regard should be had to the provisions of rule 18 (4)[3]:

> "*Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim. . . with sufficient particularity to enable the opposite party to reply thereto*".

[11] The general principles in interpreting pleadings were stated by Heher J in *Jowell v Bramwell-Jones and Others*[4]:

> "*(a) minor blemishes are irrelevant;*
>
> *(b) pleadings must be read as a whole; no paragraph can be read in isolation;*
>
> *(c) a distinction must be drawn between facta probanda . . . and facta probantia. . .;*
>
> *(d) only facts need to be pleaded; conclusions of law need to be pleaded;*
>
> *(e) . . . certain allegations expressly made may carry with them implied allegations and the pleading must be so read. . .*"

[12] The pleader is required to state its case in a clear and logic manner so that the cause of action can be made out of the allegations stated. The material facts (*facta probanda)* should be pleaded, as opposed to facts used to prove (*facta*

---

[3] Uniform Rules of Court
[4] 1998 (1) SA 836 (W) at 902 I-J and 903 A-B

probantia) such material facts, that is, the evidence[5]. The defendant must persuade the court that upon every reasonable interpretation, the particulars of claim fail to disclose a cause of action[6]. The *onus* of showing that a pleading is excipiable rests on an excipient[7].

[13] It is clear that the first and second exceptions are in all respects similar. The only difference is that the first exception is aimed at the Elarduspark agreement, whereas the second exception is aimed at the Lonehill agreement.

[14] Counsel for the plaintiffs[8] submits that the two agreements referred to in the particulars of claim, are not the integral part of the plaintiffs' cause of action against the defendant and that it was only pleaded to illustrate why payments were made. In my view there is no merit in this submission. A party clearly "*relies upon a contract*" or part thereof when he uses it "*as a link in the chain of his cause of action*[9]".

[15] For the purpose of deciding an exception, a court must assume the correctness of the factual averments made in the relevant pleading, unless they are palpably untrue or so improbable that they cannot be accepted. An excipient has the duty to persuade the court that, upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed[10].

[16] The third exception is essentially that the plaintiffs failed to plead specifically which payments were made pursuant to which agreement. Plaintiffs' counsel submits that it is completely irrelevant for which agreement the payments were made. I do not agree with this submission. A plaintiff suing for damages shall set

---

[5] *Mckenzie v Farmers Corporative Meat Industries Ltd 1922 AD*
[6] *First National Bank of Southern Africa Ltd v Perry NO 2001 (3) SA 960 (SCA) at 965 D*
[7] *South African National Parks v Ras 2002 (2) SA 537 at 542 (C)*
[8] Advocate T Cooper
[9] *South African Railways and Harbours v Deal Enterprises (Pty) Ltd 1975 (3) SA (W) at 953 A*
[10] Per H J Erasmus in Francis Sharpe 2004 (3) SA 230 (C) at 231 D

them out in such a manner as will enable the defendant reasonably to assess the quantum thereof[11]. This does not however mean that the plaintiff must ignore the provision of rule 18(4), which requires every pleading to contain *"a clear and concise statement of the material facts upon which the pleader relies for his claim. . ."*[12]. To annex numerous emails to the particulars of claim, hardly provides a clear and concise statement.

[17] The grounds of the defendant's exception in this matter, actually displays that the plaintiff's cause of action is vague and embarrassing and that the defendant is not in a position to answer to the plaintiff's claim. I am therefore satisfied that the excipient is entitled to an order upholding the exception.

[18] In the result, I make the following order:

1. *The exception is upheld with costs;*

2. *The plaintiffs particulars of claim is struck out;*

3. *The plaintiffs are afforded a period of fifteen (15) days from date of this order within which to amend the particulars of claim.*

D S MOLEFE
JUDGE OF THE HIGH COURT

[11] Rule 18(10) of the Uniform Rules of Court
[12] *Doyle v Sentraboer (Co-operative) Ltd 1993 (3) SA 176 at 181 E-F*

APPEARANCES:

Counsel on behalf of 1st & 2nd Plaintiff/Respondent	:	**Adv. T Cooper**
Instructed by	:	**Dyason Incorporated**
Counsel on behalf of Excipient/Defendant	:	**Adv. N Marshall**
Instructed by	:	**Van Schalkwyk Attorneys**
Date of Hearing	:	**3 December 2018**
Date of Judgment	:	**7 February 2019**