IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

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

16/3/2021
DATE

SIGNATURE

Case Number: 11587/2019

SMADA SECURITY SERVICES (PTY) LTD Plaintiff / Excipient

AND

TSHWANE UNIVERSITY OF TECHNOLOGY Defendant

JUDGMENT

H G A SNYMAN AJ

INTRODUCTION

[1] This is an exception by the plaintiff / excipient ("*SMADA*") against the plea and two counterclaims of the defendant ("*TUT*").

[2] SMADA is a company that renders security and security related services. TUT is an institution of higher education established in terms of the Higher

Education Act, Act 1 of 1997. TUT's main campus is situated at Off Staatsartillerie Road, Technikon Place, Pretoria West, Pretoria, Gauteng.

[3] SMADA and TUT allegedly entered into a written agreement on 2 July 2012 following a tender process. In terms of this agreement SMADA would render security and security related services at the TUT campus ("*the service agreement*"). SMADA allegedly rendered these services to TUT and an amount of R5,555,925.84 is allegedly due and payable to it, which TUT failed or neglected to pay. On 19 February 2019, SMADA instituted action against TUT claiming payment of the said amount, with interest and costs.

[4] As part of TUT's plea to SMADA's particulars of claim, it *inter alia* raised a special plea of prescription. TUT also instituted two counterclaims against SMADA.

[5] The first counterclaim is based thereon that three named security officers of SMADA, whilst on duty and rendering security services at TUT, stole certain goods from TUT, which allegedly had a value of R576,903.93 ("*the first counterclaim*"). The claim is that SMADA is vicariously liable for the conduct of the said employees. TUT pleads that the goods stolen are described and detailed as appears from annexure "**A**", annexed to the first counterclaim. Annexure "**A**" is on the face of it a signed agreement of loss entered into between TUT and its insurers. In terms of this TUT agreed to accept the sum of R576,903.93 (VAT inclusive) in full and final settlement and satisfaction of

all and any cause of action, claim, loss or damage which TUT may have suffered as a result of the goods being stolen. It is also pleaded that the damage that TUT suffered is quantified as set out in annexure "**A**".

[6] The second counterclaim is based thereon that during or approximately March and April 2017, SMADA's security guards embarked upon strike action and intentionally damaged property of TUT ("*the second counterclaim*"). This claim is also based thereon that the said employees were acting in the course and scope of their employment and that SMADA is therefore vicariously liable. The said security guards allegedly at the time stoned and damaged a bus full of TUT students and "*destroyed*" TUT's parameter fencing at the main gate to TUT's campus. TUT pleads that it suffered damages in that it had to repair the parameter fencing and incurred expenses in the amount of R81,214.74. It is pleaded that this amount is calculated and arrived at per the description of a quotation which is attached as annexure "**B**" to the second counterclaim. TUT pleads that it does not know the individual names of these employees, and that it is not able to furnish any better particularity relating to the identification of SMADA's aforementioned employees.

[7] SMADA noted an exception on five grounds against TUT's plea and the two counterclaims. Only four of these grounds were eventually persisted with in argument before me. The exception against TUT's special plea of prescription is that it fails to disclose a defence and is vague and embarrassing. The exception against the first counterclaim is that it fails to

disclose a cause of action. The two exceptions against the second counterclaim are that the second counterclaim fails to disclose a cause of action and is vague and embarrassing.

[8] Counsel for TUT alerted me at the hearing to the fact that following the exception, SMADA introduced an alternative claim based upon unjust enrichment which is brought in the alternative. TUT filed a consequentially amended plea in which a second special plea was introduced. The plea in so far as the averments contained in the original particulars of claim is concerned basically remained the same. Counsel for TUT submitted that the correct methodology is that the exception strictly speaking ought to have been directed to the pleadings in their latest format, because if this court for instance find that there is merit in any one of the grounds of the exception, which set of pleadings should then be set aside? He stressed however, that in so far as the grounds of exception are concerned, TUT's second set of pleadings do not differ in any respect from the set against which SMADA raised the exceptions. Counsel also made it clear that he can not argue that TUT's amended pleadings are in themselves an answer to the exception because the matters of which SMADA complains, still appear in the further pleadings. In respect of the newly introduced second special plea is concerned, TUT's counsel pointed out that that plea is also based on prescription, i.e. that SMADA's claim based upon enrichment has prescribed. Counsel pointed out that there is no exception against that special plea. The

only relevance of this, it was submitted is that counsel for SMADA raised it in her heads of argument that the purpose of an exception is to save costs and to bring a swift end to matters. Although counsel for TUT agreed with that proposition, he submitted that it should be abundantly clear that in this matter there will be a trial, whether the exception against the first special plea succeeds or not, because it is not also directed at the second special plea.

[9] I made it clear to counsel that what I would consider for purposes of my judgment is TUT's amended special plea and counterclaim, since the amended consequential amendment does not change anything. I will test this against the four remaining grounds of exception. Counsel accepted that this was the correct approach for me to follow.

THE LEGAL POSITION

[10] Counsel on behalf of the parties were in agreement in their respective heads of argument and in argument before me regarding the broad legal position in so far as exceptions are concerned.

[11] In so far as exceptions based thereon that the pleading fails to disclose a defence or cause of action, it is trite that the function of a well-founded exception is to dispose of the case, in whole or in part and that this avoids the unnecessary leading of evidence. [**Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (A) at 553F-I.**]

[12] An exception must be determined on the pleadings as they stand, assuming the facts stated therein to be true. An excipient has the duty to persuade the court that upon every interpretation, which the pleading in question (and in particular the document upon which it is based) can reasonably bear, no cause of action or defence is disclosed, failing which the exception ought not to be upheld.

[13] Rule 18(4) of the Uniform Rules of Court requires that: "*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 to enable the opposite party to reply thereto.*"

[14] To give effect to the requirement in rule 18(4) a plaintiff is required to plead *facta probanda*; namely the material facts, and not conclusions, that (if proved) will disclose a cause of action. *Facta probantia* on the other hand, are the particulars of all the evidence that the plaintiff will lead in order to prove the pleaded material facts (*facta probanda*). **Makgae v Sentraboer (Koöperatief) Beperk 1981 (4) SA 239 (T) at 245D** puts the point crisply.

[15] In so far as the legal position is concerned for purposes of an exception based thereon that the pleading is vague and embarrassing, this is directed at the formulation of the whole cause of action, or defence. Exceptions like these are intended to cover the case where there is some or other defect or

incompleteness in the pleading, which results in embarrassment to the pleader, despite a cause of action or defence being apparent from the pleading. I was in this regard referred to Erasmus' Superior Court Practice Commentary on Rule 23 at D1-298 – D1-301 read *inter alia* with **Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 899G**.

[16] In order for an exception to succeed on grounds of vagueness and embarrassment, it must be demonstrated that the excipient will be "*seriously prejudiced*" if the offending allegations are not expunged. The excipient carries the onus to show vagueness amounting to an embarrassment and embarrassment amounting to prejudice, failing which the exception cannot succeed. [**Quinlan v MacGregor 1960 (4) SA 383 (D) at 393F-H**.]

[17] I was also referred to the decision in **Trope v South African Reserve Bank and Another and Two Other Cases 1992 (3) SA 208 (T)**. The court explained the principle that underpins the requirement of particularity in rule 18(4) to be this (**at 210G-H**): "*It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trail prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made ...*".

[18] The court at **211B** summarised the position as follows: "*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.*"

[19] The ultimate test as to whether or not an exception should be upheld on this ground, is whether the excipient is prejudiced. The evaluation of prejudice is a factual enquiry and is a question of degree. The decision must necessarily be influenced by the nature of the allegations, their content, the nature of the claim and the relationship between the parties. [**ABSA Bank Ltd v Boksburg Transitional Local Council 1997 (2) SA 415 (W) at 422A**.]

[20] I was also referred to **Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 905G-H** where it is stated that: "*I must first ask whether the exception goes to the heart of the claim and, if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet ...*"

[21] In summary, therefore, vagueness amounting to embarrassment and embarrassment in turn resulting in prejudice must be shown. Vagueness would invariably be caused by a defect or incompleteness in the formulation and is therefore not limited to an absence of the necessary allegations but also extends to the way in which it is formulated. An exception will not be

allowed, even if the pleading is vague and embarrassing, unless the excipient will be seriously prejudiced if compelled to plead against which the objection lies.

[22] It was common cause between the parties at the hearing that an excipient is bound to the grounds listed in its exception and cannot go wider than that in argument.

FIRST GROUND OF EXCEPTION

[23] SMADA's first ground of exception is levelled against TUT's special plea of prescription of a portion of SMADA's claim, which relates to services rendered prior to 26 February 2016.

[24] It is stated that prescription commences to run as soon as a debt is due and a party who raises prescription must allege and prove the date of inception of prescription. The complaint is that TUT asserts in paragraph 1.3 of its plea that the debt became due "*at the end of the month during which the services were rendered*", but does not provide any particulars in support of the conclusion pleaded.

[25] The exception is therefore that TUT has failed to make the necessary allegations in support of the special plea of prescription and that it follows that the special plea fails to disclose a defence and is furthermore vague and embarrassing.

THE SECOND GROUND OF EXCEPTION

[26] The second ground of exception was that paragraphs 8 and 9 of the plea admit the existence of the service agreement entered into between TUT and SMADA, but that TUT then later on disputes the existence of the agreement by denying that an "*enforceable agreement*" came into existence. The complaint was that this renders the plea vague and embarrassing.

[27] Counsel for SMADA made it clear at the hearing that SMADA no longer relied on this ground of exception.

THE THIRD GROUND OF EXCEPTION

[28] The third ground of exception is aimed at the first counterclaim, i.e. the claim for damages following the theft in the sum of R576,903.93 of goods "*as described in detail on annexure 'A' to the claim*".

[29] The first complaint is that *ex facie* annexure "**A**", TUT accepted payment in the sum of R576,902.93 from its insurer in full and final settlement and satisfaction of its cause of action, claim, loss and/or damage arising from the events that form the basis of the first counterclaim. It is stated that in the first instance, a party claiming delictual damages is obliged to allege and prove the damages suffered as a result of the other party's unlawful conduct. *Ex facie* annexure "**A**", TUT has not suffered any damages as its insurer compensated it for this loss.

[30] SMADA therefore contends that TUT's first counterclaim is excipiable for want of disclosing a cause of action.

[31] The second complaint as part of this exception was that in terms of the doctrine of subrogation, in view of the payment by the insurer, TUT does not have the requisite *locus standi* to pursue a claim against SMADA. This complaint was, correctly in my view, not persisted with in argument before me. [Payment by an insurer, after the event, is immaterial. **See Smith v Banjo 2011 (2) SA 518 (KZP) at paragraphs 12 and 13.**]

FOURTH GROUND OF EXCEPTION

[32] The fourth ground of exception is directed at TUT's second counterclaim for payment in the sum of R81,214.74 for expenses allegedly incurred towards repairs for the damaged parameter fence.

[33] The exception refers to the fact that TUT pleads in paragraph 16.2 read with paragraph 17.2 of the second counterclaim that it does not know the names of SMADA's employees who caused the damage and that TUT is not able to furnish any better particularity regarding their identification.

[34] The complaint is that TUT is obliged to allege and prove that the persons who committed the delict were employees of SMADA; the scope of their duties; and that the alleged employees performed the delictual act in the course and scope of their employment.

[35] The exception was that TUT has failed to make the necessary allegations to support a cause of action for vicarious liability, thereby rendering the second counterclaim excipiable for want of disclosing a cause of action.

FIFTH GROUND OF EXCEPTION

[36] The fifth ground of exception is also directed at the second counterclaim.

[37] SMADA relies in this regard on rule 18(10) of the Uniform Rules of Court ("*the rules*"), which provides that a plaintiff suing for damages is obliged to set out its claim in such a manner as will enable a defendant to reasonably assess the quantum thereof.

[38] The complaint is that the second counterclaim amount of R81,214.74 is not quantified in the particulars of claim and that the references apparent from annexure "**B**" to the counterclaim do not constitute a formulation and description of the alleged damages in a manner that would enable SMADA to reasonably assess the quantum thereof.

[39] Moreover, that the second counterclaim equates non-compliance with the rules and is excipiable as a result of vagueness and embarrassment. SMADA is prejudiced in that it is unable to ascertain what case it has to meet at trial.

ARGUMENT ON BEHALF OF SMADA

[40] As part of her oral address, counsel on behalf of SMADA referred me to the resolutive conditions contained in paragraph 19 of the service agreement as well as paragraphs 20 and 21 thereof. She pointed out that clause 19.1 and 19.2 provided certain criteria for the security officers who had to render services in terms of the service agreement. Paragraph 20 dealt with breach Counsel for SMADA submitted that it is important to consider these clauses of the agreement, albeit that there is a difference of opinion whether they are resolutely or suspensive conditions, in considering whether an agreement was entered into with TUT.

[41] Counsel for SMADA then referred me to paragraph 4 of SMADA's particulars of claim where it is alleged that the agreement was entered into. With reference to paragraph 4.3 of the particulars of claim, counsel referred me to paragraph 10 of TUT's plea where TUT pleaded to paragraph 4.3 of the particulars of claim. Counsel argued that the plea that TUT raised regarding the suspensive conditions, etc. in paragraph 10.2, has relevance in respect of the first ground of exception, namely the exception against the special plea of prescription. The conclusion counsel argued for was that the admissions contained in the plea read with the limited denial of the existence of the service agreement, does not assist TUT's special plea of prescription.

[42] She argued that TUT in paragraph 10 denied the existence of the service

agreement purely with reference to the non-fulfilment of the suspensive conditions. Counsel then referred me to the last sentence of paragraph 12 of TUT's plea where TUT pleads as follows: "*[TUT] accepts that the agreement had the terms as pleaded in paragraph 5.2, but only to the extent that the terms as pleaded correspond with the express terms recorded in the agreement. To the extent that the alleged terms do not correspond with the express provisions contained in the agreement, the allegations are denied.*"

[43] Counsel made it clear, however, that I was not at this stage called upon to decide whether the resolutions were suspensive or resolutely. This will be something for the trial court to determine. But she submitted that the denial of the service agreement only extended to the denial to the extent that those conditions have not been fulfilled. Counsel then referred me to clause 13 of the agreement that deals with contract rights, penalties and incentives. She drew my attention specifically to clause 13.2, which provides that: "*An invoice, fully complying with the prescriptions by SARS, specifying the services rendered during that current month and detailing the amount due will be submitted to [TUT] before the seventh (7) day of the month following the month in which the service was rendered. [TUT] shall effect payment within thirty (30) days after the date of receipt of the invoice(s).*" (my emphasis).

[44] Counsel for SMADA stressed that it was important to consider the emphasised portion of section 13.2 above. She submitted in this regard that

this clause means that only in the month following the month during which the services were rendered an invoice is submitted. Payment only becomes due thirty days after that.

[45] I was then referred to paragraph 1.3 of TUT's amended special plea, plea and counterclaims. Counsel quoted what was pleaded in paragraph 1.3 of the special plea, namely that: "*The debt proportionally became due as time progressed, and the debt relating to the services of each month, became due at the end of the month during which the services were rendered, namely the debt for January 2016 became due at the end of January 2016 and the debt for February 2016 became due at the end of February 2016.*" It is this conclusion, which forms the focus of first ground of exception.

[46] Counsel for SMADA submitted in this regard that it was incumbent on TUT to plead the reason why the debt would have become due on the said date. In answer to my question what TUT should in fact have pleaded, counsel submitted that they had to plead that prescription started on X date by reason of something specific. She argued that for instance, it should be pleaded if there is an agreement to this effect, or if it is simply based on TUT's say so.

[47] In this instance TUT pleaded that it became due at the end of the month during which the services were rendered. But "*why?*" counsel argued. This according to counsel refers to some or other contract, which is not pleaded. The terms of such an agreement are not apparent from the special plea. In

the alternative, counsel submitted that there is some defect in the way in which this was pleaded and that it is therefore incomplete, which renders it vague and embarrassing.

[48] In conclusion with reference to the first ground of exception, counsel for SMADA pointed out that the service agreement did contain a non-variation clause, namely clause 35. She stated that in absence of the "*why*" the allegation that prescription started to run at the end of each month during which the services were rendered, renders the plea even more vague and embarrassing. She argued even more so since TUT admits the terms of the agreement, but only relies on the conditions for pleading that it is not bound thereto. The gist of the argument was therefore that TUT cannot on the one hand rely thereon that the terms of the contract fix the due date, but on the other hand deny the existence of the contract.

[49] In so far as the third to the fifth grounds of exception are concerned, i.e. the counterclaims, counsel for SMADA submitted that both of these are delictual claims based on the *Lex Aquila*, aimed at holding SMADA vicariously liable. She submitted in this regard that the *Lex Aquila* entitles a plaintiff to claim for patrimonial loss suffered from the wrongful or negligent act of a defendant. She pointed out that in this regard there are certain things which a plaintiff must allege and prove. This included that the plaintiff must allege and prove the extent of the loss suffered. She pointed out that in respect of the first counterclaim, TUT identified who the employees are who caused "*the*

damage". This can be distinguished from the second counterclaim, where the relevant alleged employees are not identified.

[50] With reference to the *Lex Aquila* counsel on behalf of SMADA submitted that a plaintiff claiming for damages has various ways to plead this, taking into account that you are only entitled to claim damages to the extent your patrimony has actually been diminished. She submitted that the first way to do this in respect of an article which has been damaged, is for a plaintiff to prove the reasonable costs of repairs in order to restore it to its original state. Alternatively, a plaintiff can claim the difference between the pre-delictual value of the goods as compared to the post-delictual value. In the event that an article is lost, a plaintiff is required to establish its market value, or the replacement value at the date of the delict. This is the general proposition in our law.

[51] Counsel then referred me to paragraph 9 of the first counterclaim where it is pleaded that: "*The breach by [SMADA] and its employees (for which [SMADA] is liable) of the said provisions of the service level agreement caused [TUT] to suffer the damages quantified in Annexure 'A' hereto.*" She then took me through what appears from annexure "**A**".

[52] As part of her submissions counsel on behalf of SMADA acknowledged that there is a principle that notwithstanding the fact that an insurer has paid out, a plaintiff may still in certain circumstances claim for the loss. She referred

me in this regard *inter alia* to **Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A)**. She submitted, however, that that principle is not applicable in the present instance. First of all, TUT has not pleaded it, but according to her it is actually not relevant. Based on the principles of the *Lex Aquila*, the plaintiff must allege and prove its damages on any of the bases referred to earlier herein. Counsel relied in this regard on what is stated in Amlers Precedents of Pleadings, 9th Edition, at page 144. Counsel criticised the first counterclaim for not pleading these details. For instance, it does not deal with the three bases based upon which damages may be claimed in terms of the *Lex Aquila*. It is not pleaded what was stolen, what the pre-delictual values of these were, or what their replacement values were. She argued in this regard that to the extent that TUT relies for its claim on goods being stolen that is not pleaded at all. She argued that the loss was simply not established and that in the result the first counterclaim fails to disclose a cause of action as one of the five essential elements of a delictual claim has not been shown.

[53] In summary therefore, she submitted that TUT pleads that it has suffered damage of R576,903.93 with reference to annexure "**A**". However, annexure "**A**" is a document that shows that TUT has not suffered any loss.

[54] Counsel for SMADA then dealt with the fourth and the fifth grounds of exception aimed at the second counterclaim. She submitted in this regard that TUT pleads that the fence was "*destroyed*" by employees of SMADA, who are then not named and who TUT says it cannot name.

[55] Counsel submitted with reference again to Amlers (page 370) that in order to succeed with this claim, TUT will have to allege and prove that the persons who were involved in this incident were SMADA's employees. She submitted in this regard that SMADA does not know who these individuals are, as they are not named. TUT also did not plead the scope of the duties of these employees at the time. Counsel submitted that if her client does not know who these alleged employees are, how is it able to ascertain what the scope of their employment was? Thirdly, that TUT will have to allege and prove that they did this in the course and scope of their employment. This is also not alleged.

[56] Counsel for SMADA referred me to the heads of argument that was filed on behalf of TUT where it is stated that it is not really necessary for this to be pleaded. She asked how is TUT going to lead evidence on this at the trial? In answer to a question from me whether it was necessary for TUT to name these employees, counsel for SMADA submitted that they are prejudiced since they cannot admit or deny this in a plea because details are not provided.

[57] The prejudice complained of is essentially that SMADA is not in a position to plead to this. Accordingly, SMADA is not in a position to admit or deny or confess and avoid. She submitted in this regard that there is incompleteness in this cause of action, which renders the pleading vague and embarrassing.

[58] On a question of what exactly is missing, counsel for SMADA submitted that it is the identity of the specific persons involved. She submitted in this regard that since their identities are missing, the scope of their employment is also missing. Thirdly, that SMADA does not know whether the alleged act was in the course and scope of their employment.

[59] In answer to a question from me if it can ever be in the course and scope of the employees' employment to break down the fence, counsel for SMADA submitted that it can never be.

[60] In respect of the fifth ground of exception the submission was made that reparation can only be done to something that has been damaged. If something is destroyed, it has to be replaced. With reference to what appears from annexure "**B**", counsel for SMADA submitted that it is not pleaded by TUT what the reasonable replacement cost was for this destroyed fence. If what happened was that it was completely destroyed, they had to plead what the replacement costs were. TUT also does not plead how these expenses, are made up. It merely quotes the figure of R81,214.74 with reference to annexure "**B**". If one then has regard to annexure "**B**" it is really non-descriptive, save in minor respects. It was submitted that the basic requirements of what needs to be pleaded and proved in terms of the *Lex Aquila* have not been set out. Also that this does not comply with rule 18(10) of the rules. The damages are not set out in order to enable SMADA to reasonably assess the quantum thereof. It was submitted that this amounts

to vagueness and embarrassment because SMADA is unable to plead thereto. It is therefore severely prejudiced. It cannot be expected from a defendant in reconvention to deduct what the expenses are. Are they repairs or are they replacement costs? SMADA simply does not know.

ARGUMENT ON BEHALF OF TUT

[61] Counsel for TUT's overarching submission was that SMADA's complaints are all matters upon which they can plead or respond in pleadings and these issues can be sorted out at the trial or through further particulars. None of them are of the kind where this court should in the exercise of its discretion now interfere with that at the exception stage.

[62] Counsel submitted that it is trite that an excipient must stand or fall with the grounds of exception advanced in the exception, which is a pleading, and one cannot broaden the attack on the pleadings as a matter of substance by raising points in your heads of argument, or as part of your oral argument, which have not been covered in your exception. TUT's counsel submitted in this regard that a number of the aspects raised in argument on behalf of SMADA was in fact not raised in the exception.

[63] In respect of the first ground of exception, counsel for TUT submitted that if this court apply the trite principle that at this exception stage, it should be accepted that what is stated in TUT's plea is correct, then the first ground of

exception has no merit. Put otherwise, if it is accepted as correct that the debt became due at the end of the month upon which the service has been rendered, the plea does sustain a defence as part of the special plea. It matters not that the service agreement may refer to different date.

[64] Counsel for TUT accepted that this may instead render the plea vague and embarrassing because what is alleged in the plea differs from what appears from the service agreement. However, he submitted that I should not uphold the first ground of exception on this basis simply because this was not raised in the exception.

[65] Counsel's second point was that although TUT admitted signature of the service agreement, it was pleaded that there are conditions in the service agreement which have been styled resolutive albeit TUT believes they are actually suspensive. That SMADA said nothing in its particulars of claim whether those conditions, if they are suspensive, have been complied with and in that event TUT denied that an enforceable agreement came into existence. In the alternative TUT pleaded that in the event of the court finding that the agreement is binding and enforceable, TUT admits the terms which SMADA allege to the extent they accord with the express provisions of the agreement. Under the circumstances counsel for TUT submitted that to hold TUT to a paragraph in the contract, namely 13.2, ignores, the main case advanced by TUT and that is that there is no contract. Moreover, if there is no contract, then payment would be due at the end of the month or at least if

in the absence of contractual terms which can guide the parties, the matter must go to trial so that the trial court can ascertain whether TUT is correct in its submission that the debt became due at the end of the month.

[66] Counsel for TUT submitted in addition, however, that this is a very minor issue as the entire issue relating to the first special plea of prescription relates only to the invoice or at maximum two invoices, namely those for January and February of 2016. This is because TUT conceded in its plea that the summons were served on 26 February 2019 and given the fact that it is common cause that the prescriptive period is three years it results in a minor issue in the trial. He therefore submitted in conclusion that the special plea as pleaded does sustain a defence and is not vague and embarrassing (on the basis as alleged in the exception).

[67] Even if it is said to be vague and embarrassing it is not of the which strikes to the root of the matter. Counsel referred in this regard to **Jowell v Bromwell-Jones** where it was clearly pointed out that for an exception on that second leg, namely vague and embarrassing to succeed it has to strike at the root of the entire cause of action. Counsel submitted that in this matter the parties perfectly understand where they differ from each other and it is open for SMADA to file a replication and to say: "*but you are wrong if you say the debt became due at the end of the month. Look at the contract. 13.2 says it only becomes due one month after the service has been rendered and therefore you are wrong if you say the debt became due the end of the month.*

There is no vagueness. There is no embarrassment." Counsel therefore submitted that there is no merit in the first ground of exception.

[68] In respect of the third ground of exception, counsel for TUT referred me to **Van Dyk v Cordier 1965 (3) SA 723 (O)**, which he submitted was the *locus classicus* which gives guidelines on when are insurance payments *res inter alios acta* (*"a thing done between others does not harm or benefit others"*). Counsel referred me in this regard to the judgment of Mr Justice De Villiers with whom Mr Justice Hofmeyer agreed at **page 724H** where it was held that: "*This is an appeal from an order by a magistrate granting absolution from the instance in respect of appellant's claim against the respondent for damages to appellant's car as a result of respondent's negligence. At the hearing, appellant adduced evidence to prove that his car, which was ensured, was damaged in a collision with another as a result of the negligent of driving of the respondent, that at the instance of the insurance company and pursuant to the policy of insurance, his car was repaired to his satisfaction and the cost of repairs was paid by the said company. At the close of the appellant's case the magistrate upheld respondent's application for absolution on the ground that, on the assumption that the respondent's negligence had been established, appellant had failed to prove that the policy of the insurance had been ceded back to the insurance company for whose benefit the action had in fact been instituted. … In my view the magistrate erred. As pointed out by Mr Kumleben, who appeared on behalf of the appellant, after appellant had*

prima facie proved his right to claim damages from the respondent, the onus was on the respondent to prove that the appellant's cause of action had been lost as a result of a cession to the insurance company or to some other person."

[69] Counsel for TUT also referred me to the Law of South Africa, first reissue, Butterworths ("*LAWSA*") regarding when insurance payments are *res inter alios acta.* In LAWSA Volume 7, under the heading "*Damages*", paragraph 43, it is stated that: "*There are practical guidelines as to which benefits may be taken into account in particular circumstances in reducing the amount of damages to which the plaintiff is entitled and which benefits are to be ignored. The following benefits which the plaintiff has received or will probably receive on account of his or her loss are seen as res inter alios acta (they are not taken into account in reducing plaintiff's damages): (a) benefits in terms of indemnity insurance and non-indemnity insurance (life assurances).*" The authors then they give further examples.

[70] Counsel submitted that as a general rule this issue is not something which can be sorted out on exception. The matter must go to trial so that one can explore better whether the insurance policy payment is *res inter alios acta* or not. SMADA can ask further particulars, ask the discovery of the insurance policy. The trial court, which has the benefit of hearing all of the evidence surrounding that is in a much better position than this court to decide whether this non-suits TUT or not.

[71] With reference to the matter of **Dippenaar v Shield Insurance 1979 (2) SA 904** relied upon by counsel for SMADA, counsel for TUT submitted that that matter can clearly be distinguished as it dealt with something completely different than the patrimonial loss at stake in the present matter. (Counsel for SMADA did not dispute this in her reply. In stead, she explained that the only reason she referred to **Dippenaar v Shield** is that the matter gives a good exposition at **page 915B-F** about *res inter alios acta,* with reference to patrimonial damages and non-patrimonial damages.)

[72] Counsel for TUT therefore concluded that there is also no merit in the third ground of exception. The mere fact that annexure "**A**" to the first counterclaim states that money has been paid by an insurance company does not render it a matter where TUT cannot prove damages. At the very best for SMADA, it is something for the trial court. To the extent that there is an attempt to raise an issue about the quantification of that claim as part of the exception, counsel submitted that there is also no merit in that. Annexure "**A**" shows the different components of how the damages had been calculated and arrived at and these had been set out adequately and thoroughly.

[73] In respect of the fourth ground of exception, counsel for TUT submitted that he is not aware of any principal in our law as contended for by counsel of behalf of SMADA, namely, that in order for TUT to establish vicarious liability it has to prove the identity of the employees. In this regard he submitted that such a requirement would be very prejudicial to many plaintiffs. He gave the

example of for instance claims against the South African Police Service (*"SAPS"*), for police brutality. The claimant in such an instance usually does not know the names of the police officials involved, but if they had police clothes on and they were stationery close to police vehicles it would suffice to allege that they were police officers. On a practical level, in this matter it is good enough for TUT to say these were your employees, but I do not know their names. It is then for SMADA to say, well on what facts do you rely that this is my employees? Then the answer can be they had uniforms on typically of the nature worn by your security guards. They stood close to your security vehicles, etc. Counsel submitted that TUT can for instance ask discovery of SMADA's duty rosters for that particular period.

[74] Counsel therefore submitted that it is not the law that if you cannot identify an employee in a claim against the employer for vicarious liability, it renders your claim of the kind which does not disclose a cause of action or vague and embarrassing.

[75] In respect of the question by counsel on behalf of SMADA that if SMADA does not know the identity of these employees, how can it be said that they acted within the course and scope of their employment, counsel for TUT pointed out that as part of the second counter claim, TUT specifically pleaded that these unidentified employees were as a fact all acting within the course and scope of their employment with SMADA. Moreover, that this was under circumstances where SMADA is vicariously liable for their conduct.

[76] Counsel submitted that if one is dealing with the kind of claim like the present, where it is alleged that SMADA's security guards have actually positively damaged the property of TUT, instead of protecting it, it is something which gives you sufficient information to understand what is the conduct complained of. Counsel submitted that this is not a simple allegation to say I suffer damages as a result of conduct of your employees and you are vicariously liable for them. It is specifically stated what these security guards have done in order to cause the damage. Whether it was security guard A or security guard B who did it, the same principles apply. Counsel argued that this is also a matter which can be far better addressed at a pre-trial preparation level by further particulars and discovery. Counsel submitted that it might very well be that the identities of these persons may become known when the parties get closer to trial. Counsel in this regard gave the example that TUT will be able to ask SMADA in further particulars for the names of the persons who were on duty on that particular date. On that level clarity will be procured.

[77] With reference to the remark from the bench if it can ever be within the course and scope of the employment of a security guard to break down a fence which he or she was suppose to protect, counsel for TUT referred me to the judgment of Mr Justice of Appeal Nienaber in the matter of **Minister of Safety and Security v Japmoco Motors 2002 (5) SA 649 (HHA)**. At paragraph 11 of the judgment it was held that whether conduct fell within an

employee's course and scope of employment was a question of fact. The court stated in this regard that it is sometimes a question of degree whether such conduct just fall in or outside an employee's employment and that the dividing line are not clear. What happened in this matter is that the SAPS officials who were employed at the vehicle theft unit at Rustenburg became part and parcel of a vehicle theft syndicate. They assisted the thieves in issuing false clearances that the vehicles have not been registered as stolen on the records of the police. This enabled the thieves then to go with that clearance certificates to motor dealers and to sell the vehicles as not listed as stolen. It later became apparent that these vehicles were actually stolen and that the police officers in question knew about it because they received kickbacks for granting these false clearance reports. The police argued in that matter that the police officers involved acted beyond the scope and course of their employment, and that the SAPS could therefore not be held vicariously liable. However, the Supreme Court of Appeal, then the Appellate Division, held that they acted within the course and scope of their employment. Counsel also cited other examples and concluded that this is not an instance where this court can on the exception stage have regard to this. It is a matter that must be covered in the pleadings.

[78] SMADA will be fully entitled to deny the allegations relating to vicarious liability and the trial court will hear the evidence and hear whether the guards had been on duty, and the things that played a part as to the degree of control

of SMADA. Furthermore, did SMADA as such enabled these persons to do what they actually did by putting them there in their employment. They had to be at the site where they then came to commit damages and so forth. Council submitted that those are issues for the trial court.

[79] This then according to counsel for TUT disposed of the fourth ground of exception.

[80] In respect of the fifth ground of exception, counsel for TUT submitted that it clearly has no merit whatsoever. Counsel referred me to the fact that the basis of this exception is that TUT is claiming damages, but has not according to SMADA articulated how the damages have been calculated and arrived at as prescribed by rule 18 of the rules.

[81] Counsel for TUT disagreed. It was argued that annexed to the second counterclaim is a detailed quotation, i.e. annexure "**B**". This enabled whoever issued it and to whoever it was issued to assess the damages. There is a description of the nature of the repairs, the components which have to be utilised as part of the repairs, etc. It was therefore submitted that for purposes of rule 18(10), this clearly disclosed a claim and is clearly not vague and embarrassing.

[82] It was also submitted that it should be remembered this is an exception. There is a big difference between an exception on the basis of vagueness

and embarrassment and an application to strike out because you have not complied with the rules. It was submitted that even if it is accepted that the second counter claim is vague and embarrassing for the reason as alleged, there can be no prejudice. SMADA can get all the particulars they require as part of further particulars. They can ask discovery. By the time the parties get to trial, there will be absolutely no prejudice. They can respond to those allegations. These allegations are not of the kind, which you cannot respond to.

[83] In respect of the submission by counsel on behalf of SMADA that SMADA does not know whether what is at stake are repairs or a replacement, counsel for TUT submitted that from the quotation that these seem to be the costs for replacement. However, even if there is uncertainty there is at this stage a fixed amount attributed per quantity, there is a price, the component of the value-added tax is differentiated from the cost as such and SMADA can plead to this and get particularity at a later stage whether this was in fact a replacement or whether it was a new item.

DISCUSSION

[84] As I see the matter TUT's amended plea and counterclaim and SMADA's exception can aptly be described as the court did in the **Quinlan v MacGregor** matter referred to herein **at page 387B** namely that: "*The declaration is certainly not a masterpiece of draughtsmanship and in several*

respects it could certainly be improved on. But whatever may be the faults from which it suffers, it does not seem to me to suffer from the particular lack of clarity complained of in the exception."

[85] In so far as the first ground of exception is concerned, if SMADA is held to the complaint raised in its exception, as it should be, and if it is accepted that what is pleaded as part of the special plea of prescription is correct, as this court should do at this exception stage, then the special plea clearly sustains the defence of prescription and this ground of exception has no merit.

[86] I agree with counsel for TUT that it matters not that the service agreement may refer to a different date for when payment for the services became due. This may render the plea vague and embarrassing because what is alleged in the plea differs from what appears from the service agreement, but this was not the complaint in the exception.

[87] I also agree with counsel for TUT that to hold TUT to a paragraph in the contract, namely 13.2, ignores, the main case advanced by TUT and that is that there is no contract.

[88] In any event it appears that the prescription issue forms a very minor part of the disputes between the parties and even if it is said to be vague and embarrassing it is not of the type, which strikes to the root of the matter.

[89] SMADA is also not prejudiced as it can in my view easily plead to this. It

knows exactly what case it has to meet. If it differs from TUT, and contends that none of its claim have prescribed, it can plead that: "*There is no vagueness. There is no embarrassment.*"

[90] In so far as the remaining portion of the third ground of exception is concerned the only complaint is that the second counterclaim fails to disclose a cause of action, because *ex facie* annexure "**A**", TUT accepted payment in the sum of R576,902.93 from its insurer. It was therefore already compensated for its loss.

[91] It needs to be pointed out that just because *ex facie* annexure "**A**", TUT was prepared to accept payment in the sum of R576,902.93 from its insurer, does not mean that it was actually paid this amount. Annexure "**A"** also provides that it was a condition of the agreement of loss that no settlement as incorporated therein shall be binding until the offer is signed and accepted by the Underwriter. There is no indication whether the underwriter in fact accepted the agreement and signed it.

[92] The above is besides the fact that any payment by TUT's insurers may be *res inter alios acta*. Based on the authority of **Van Dyk v Cordier 1965 (3) SA 723 (O)** and LAWSA TUT's counsel referred me to, it does not follow that TUT did not suffer loss and has failed to disclose a cause of action merely because an agreement of loss exists. Also, if I for present purposes accept the truth of TUT's allegation as part of the second counter claim that it did

suffer this loss, it follows that the remaining part of the third ground of exception is bad.

[93] I agree with counsel for TUT that it cannot be decided at this exception stage whether any payment by the insurer is *res inter alios acta* or not. That will be something for the trial court to determine after hearing the evidence.

[94] To the extent that counsel for SMADA as part of her address on the third ground of exception argued that the first counterclaim read with annexure **"A"** lacked particularity regarding how TUT arrived at the amount of its damages, the simple answer is that it was not open for SMADA's counsel to argue this, as it does not form part of the grounds of exception. In any event, the arguments in this regard lack merit and I agree with counsel for TUT that annexure "**A**" does show the different components of how the damages had been calculated and arrived at and these had been set out adequately and thoroughly.

[95] In so far the fourth ground of exception is concerned, I do not accept as correct counsel for SMADA's submission that in order for TUT to have disclosed a cause of action, and this ground of exception only lies against this, they had to plead the identities of the security guards in question. This is simply not the legal position. As I see it, the fact that TUT alleges that these unnamed persons were employees of SMADA is at this stage sufficient. This is the *facta probanda* that needed to be pleaded. The same applies to the

allegation that they acted in the course and furtherance of their employment.

[96] Under the circumstances, the fourth ground of exception can also not succeed.

[97] The fifth ground of exception suffers the same fate. I agree with counsel for TUT that this ground of exception clearly has no merit. Annexure **"B"** provides a description of the nature of the repairs, the components which have to be utilised as part of the repairs, etc. I agree with counsel for TUT that it is important to keep in mind that there is a big difference between an exception on the basis of vagueness and embarrassment and an application to strike out because a party has not complied with the rules. Moreover that even if it is accepted that the second counter claim is vague and embarrassing for the reason as alleged, there can be no prejudice.

COSTS

[98] In TUT's heads of argument it asked for a special cost order against SMADA. However, in argument before me counsel for TUT agreed that this matter is not worthy of a punitive cost order.

[99] I see no reason why costs should not follow the event.

[100] Counsel for TUT submitted that *inter alia* since a variety of grounds of exception were raised, that this court in the exercise of its discretion order

that to the extent that senior counsel was involved in the matter, that the costs will include those consequent upon the engagement of senior counsel. I see no reason why such an order ought not to be made.

[101] Under the circumstances the following orders are made.

ORDER

1. The plaintiff / excipient's exception dated 7 October 2019 is dismissed with costs.

2. The plaintiff is ordered to pay the defendant's costs, those costs to the extent that senior counsel was involved in the matter, to include the costs consequent upon the engagement of senior counsel.

H G A SNYMAN
Acting Judge of the Gauteng High Court
Pretoria

Virtually heard: 22 February 2021

Electronically delivered: 16 March 2021

Appearances:

For the plaintiff / excipient:	Adv U van Niekerk (formerly Lottering) Instructed by Waldick Jansen van Rensburg Inc

For the defendant:	Adv MP van der Merwe SC
	Instructed by Jarvis Jacobs Raubenheimer