IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

08 July 2021

SIGNATURE **DATE**

CASE NO: 58910/2019

In the matter between:

ERIS PROPERTY GROUP (PTY) LTD Plaintiff

and

HL KROON PROPERTY DEVELOPMENTS (PTY) LTD **First Defendant**

PURE CONSULTANTS **Second Defendant**

HANS VAN WAMELEN **Third Defendant**

JUDGMENT

BHOOLA AJ

INTRODUCTION

[1] The plaintiff in this action, institutes a claim against the first, second and third defendants; jointly and severally, the one paying the other to be absolved, for damages arising from a written building contract including various addendums attached to the contract.

[2] The alleged damages arose out of an incident which occurred on the 21st October 2016 when gusts of wind caused the roof of the building described in the main contract to lift, causing amongst other things, structural damage to the building as well as the destruction of the roof canopy;

[3] The plaintiff alleges that the damage was caused as a direct result of the following primary reasons:

3.1 latent defects in respect of the design specifications; and

3.2 patent defects in respect of the execution of the works in regards to the roof design, structure and affixing to the building of the property;

[4] The second defendant filed and served a notice of intention to defend on the 29th August 2019. On the 6th January 2020, the second defendant delivered a notice in terms of Rule 23(1) of Uniform Rules to the plaintiff. Essentially, the second defendant complains that the plaintiff's particulars of claim annexed to the summons is vague and embarrassing in that it fails to disclose a cause of action alternatively it lacks averments necessary to sustain a cause of action against the second defendant;

[5] In spite of receiving the notice in terms of Rule 23(1) on the 6th January 2020, from the second defendant, to remove the causes of complaint, the plaintiff was insistent that there was nothing amiss to its particulars of claim and refused to accede to the second defendant's request to remove the cause of complaint.

[6] Consequently, the second defendant (hereinafter referred to as the excipient) delivered its exception on 30 January 2020 and the plaintiff opposes such exception alleging that there is nothing defective in its pleading.

FACTS

COMMON CAUSE FACTS

[7] The common cause factual matrix of this proceedings are as follows.:

[7.1] All three defendants were involved in a building project at the Dawn Park Shopping Centre;

[7.2] The second defendant is identified as the structural engineer of the project, who attended to the design specifications of the roof and its structure in relation to the Centre and responsible for the inspection of the work carried out;

[7.3] The main agreement signed between the plaintiff and first defendant, together with the necessary addendums, relating to the contract is attached to the summons;

[7.4] The roof of the aforesaid shopping centre was damaged on 21 October 2016 as a result of a gust of wind.

[8] According to the pleadings, the damage to the Centre was caused by latent defects in respect of design specifications and patent defects in respect of the execution works.

[9] The allegations against the Excipient are incorporated in paragraphs 13 to 15 and

paragraphs 27 to 30 of the particulars of claim. The plaintiff alleges:

[9.1] The excipient failed to attend to the work in a workmanlike manner to ensure that the roof was properly fastened.

[9.2] The design specifications which were approved by the excipient provided that the roof structure is to be anchored to the building with bolts to meet a minimum depth requirement of 125mm.

[9.3] The excipient was sued in the main for a contractual claim for poor workmanship for failing to ensure, upon inspection, that the correct specified required length bolts and medium were not utilised and consequently, the roof structure was not sufficiently anchored to the specified depth.

[9.4] The alternative claim preferred was a delictual claim whereby it is alleged that the excipient as result of its professional duty, owed a duty of care to the plaintiff and it breached its duty of care in that it failed to properly inspect the building works, more particularly, the roof structure and inspected bolts.

ISSUES FOR DETERMINATION

[10] Whether the exception has merit;

[11] Whether the particulars of claim set out a complete cause of action that can be answered by the defendants.

LAW

[12] Exceptions are regulated by Rule 23 of the Uniform Rules of Court. There are generally two forms of exceptions:

12.1 The pleading is vague and embarrassing;

12.2 The pleading lacks the averments to sustain a cause of action or a defence.[1]

VAGUE AND EMBARRASING

[13] When a pleading is considered to be vague and embarrassing it usually involves a two-fold consideration:

13.1 The first is whether the pleading lacks particularity to the extent that it is vague; and

13.2 the second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced.

[14] When considering an exception of this nature, the three enquiries formulated by Heher J (as he then was) are helpful in explaining the approach to be adopted.[2]

14.1 Firstly, an enquiry has to be made into whether the exception goes to the heart of the claim (or as Innes CJ puts it, the validity of the summons as a whole.); [3] Applying the principles laid down in the decision of *Jowell V Bramwell-Jones at 899F-G,* which quoted from the decision of *Carelsen v Fairbridge, Arderne and Lawton*[4], such an exception cannot be directed at a particular paragraph within a cause of action, but ought to be directed at the whole cause of action. In such instance, it is the duty of the defendant or excipient to persuade the court that upon every interpretation of the pleading it can reasonably bear, particularly the document upon which it is based, it does not disclose a cause of action or defence, for the exception to be upheld;

[1] Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at p 905H-I (Jowell)
[2] Ibid
[3] Liquidators Waipio Shipping Co v Lurie Bros 1923 AD 69 at p 73
[4] 1918 TPD 306 at 309

14.2 Secondly, an enquiry into whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet; and

14.3 Thirdly, in the event of it being found that an exception on any ground fails, an enquiry is to be made to ascertain whether the particulars identified by the defendant are strictly necessary in order to plead and, if so whether the material facts are unequivocally set out.[5]

[15] The nature and extent of this type of exception was also considered by McCreath J in the decision of *Trope v South African Reserve Bank and Two Other Cases*[6], which was cited with approval by Heher J in the decision of *Jowell v Bramwell-Jones and Others*[7], where the court laid out the following general principles regarding exceptions:

> *"(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 the facta probanda, or primary factual allegations which every plaintiff must make, and the facta probantia, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence;*
>
> *(d) only facts need be pleaded; conclusions of law need not be pleaded;*
>
> *(e) bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them. implied allegations and the pleading must be so read: cf Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) ltd 1982 (4) SA 37 1 (D) at 377, 3798. 3790--H.'"* [8]

[5] It has been emphasized by the Appellate Division (as it was previously known) that the more complex the case the greater the particularity that is required. See Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) 107.

[6] 1992 (3) SA 208 (T) at 211

[7] Jowell Ibid 1

[8] Jowell Ibid 1 at 9021 - 9030

[16] It is permissible to take exception to an alternative claim. The caveat to this is that the alternative claim must arise out of different causes of action;[9]

[17] It is trite that a plaintiff is entitled to rely on mutually contradictory averments in his particulars of claim, provided that it is clear from the manner of pleading them, that he is only relying on the one in the event that the other is not sustainable;[10]

[18] Where an exception is based on the fact that the pleading does not disclose a cause of action or a defence, it is not necessary to afford the opponent an opportunity to remove the cause of complaint first; and the exception must be delivered within the pleading allowed for filing of any subsequent pleadings. However, the excipient has the duty to persuade the Court that upon every interpretation which the pleading in question, can reasonably bear, no cause of action is disclosed.[11]

[19] In such an exception, the particulars must contain every fact *(facta probanda)* - substantive law and not procedure[12] that is necessary for the plaintiff to prove. It does not, and is not required to, contain every piece of evidence *(facta probantia)* that is required to prove the fact.[13]

[20] The general approach to exceptions must be viewed within the context of the following comment by Harms JA:[14]

"Exceptions should be dealt with sensibly. They provide a useful

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[9] See in general the matter of Du Preez v Boetsap Stores (Pty) Ltd 1978 (2) 177 SA NC contrasted to Dharumpal Transport v Dharumpal 1956 (1) SA 700 A

[10] Feldman NO v EMI Music SA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd 2010 (1) SA 1 (SCA) at para 11.

[11] Lewis v Oneanate (Pty) Ltd and Another 1992 (4) SA 811 (A) at 817; H v Fetal Assessment Centre 2015 (2) SA 93 (CC) at 199B.

[12] Alphedie Investments (Pty)Ltd v Greentops (Pty)Ltd 1975 (1) SA 161 (T) at 161H

[13] McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 at 23; Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838E-F

[14] Telematrix v Advertising Standards Authority SA 2006 (1) SA 461 SCA

mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that cuts through the tissue of which the exception is compounded and exposes its vulnerability."

APPLICATION OF LAW TO FACTS

FIRST EXCEPTION

[21] The excipient's complaint is that the plaintiff's claim against the excipient is based on an agreement (referring to paragraphs 27 to 30 of the particulars of claim) and requires the excipient to indulge in speculation.

[22] The excipient argues, from a reading of paragraphs 27 to 28, it can be assumed that the source of these averments are based on contract and the excipient justifies this by alluding to the fact that paragraphs 29 to 30 of the particulars of claim is a claim in delict, in the alternative.

[23] Counsel for the excipient submits if the claim by the plaintiff is one advanced in contract, then all the excipient has to say about the agreement is that the excipient was *the presiding* firm of engineers whom attended inter alia to the design specifications of the roof and its structure and that the excipient "as the appointed structural engineer was responsible for all aspects of the structural engineering design and quality control".

[24] The excipient submits that a contract is an agreement between parties, entered into with the intention of creating binding obligations, to perform according to the

terms agreed.[15] The plaintiff does not say : who the contracting parties were and who represented them?, when and where was the agreement concluded?, what were the terms of the agreement and whether the agreement was oral, written or tacit? Excipient submits this renders the particulars of claim vague and embarrassing because the excipient does not know what case is advanced against it in contract[16] and the excipient cannot take instructions on the alleged agreement and plead meaningfully thereto. Subsequently, excipient submits, in essence, the plaintiff did not comply with Rule 18(6) and the excipient is embarrassed and prejudiced which makes it impossible for him to plead.

[25] In response thereto, the plaintiff submits that upon a contextual reading of the relevant paragraphs it is apparent that the excipient is liable to the plaintiff on two levels:

25.1 the first being as a result of its appointment in terms of the agreement entered into between the plaintiff and with the first defendant; and

25.2 secondly, by virtue of his appointment as the structural engineer, he is bound by the obligations as set out in the acceptance of its appointment read with the obligations pleaded in the particulars of claim.

[26] Additionally, the plaintiff prefers an alternative claim against the excipient in respect of delictual damages. The excipient had duties to perform which entailed a legal obligation on him to inspect of the items and the alleged failure to inspect them, - must be, in the context of the pleadings, read with or construed as the failure to properly design the roof.

[15] KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal 2013 (4) SA 262 (CC) at para 35

[27] The Plaintiff argues, if the excipient is able to identify the above causes of action from the particulars of claim, then the excipient can plead thereto. Plaintiff submits, there exists no merit in the two exceptions raised and that the complaints raised by the excipient are over technical and should not be permitted. He submits further, that this causes no serious prejudice to the excipient as he can plead in respect of this issue.[17]

[28] The excipient is fundamentally, relying on Rule 18(4) of the Uniform Rules[18] and Rule 18(6) of the Uniform Rules.[19] Rule 18 essentially deals with principles required in pleadings generally.

[29] In considering Rule 18(4), from a reading of the summons and particulars of claim together with the annexures appended, I find that the excipient, having been able to precisely and concisely crystalise what case it has to meet against the plaintiff, is able to plead exactly what he has excepted to. I say so for the following reasons: applying *Jowell V Bramwell-Jones at 899F-G,* which quoted from the decision of *Carelsen v Fairbridge, Arderne and Lawton*, an exception that is vague and embarrassing cannot be directed at a particular paragraph within a cause of action, but ought to be directed at the whole cause of action[20]. A pleading based on the ground that it is vague and embarrassing, strikes at the formulation of the cause of action and not its legal validity.[21]

[30] Attached to the particulars of claim is the main agreement between the plaintiff and first defendant and a plethora of addendums which makes reference to all three defendants and the duties that each of them had to perform. Each of their duties

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[17] Trans – African Insurance Co Ltd v Maluleka 1956(2) SA 273(AD)

[18] *"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"*.

[19] *"a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."*

[20] See Jowell Ibid 1 V Bramwell-Jones at 899F-G, which quoted from the decision of Carelsen V Fairbridge, Arderne and Lawton 1918 TPD 306 at 309.

[21] Trope and Others v South African Reserve Bank, Ibid 5

are chronologically and distinctly set out by the plaintiff. I am not convinced that the excipient persuaded me that upon every interpretation of the pleadings and the documents annexed to the pleadings that plaintiff's summons does not disclose a cause of action.[22]

[31] I accordingly find the plaintiff's pleadings contain clear and concise statements of the material facts and contains sufficient particularity to enable the excipient to reply thereto and that the excipient was not embarrassed by this issue and was not prejudiced.

[32] I turn now to the issue pertaining to non-compliance with Uniform Rule 18(6). The excipient argues the plaintiff did not comply with this rule as alluded to in paragraph 22 above and therefore the plaintiff's pleadings are vague and embarrassing, the excipient is prejudiced.

[33] The plaintiff in argument submitted, all the documents regarding the contract are attached to the particulars of claim and from a reading of the particulars of claim, there exists a nexus between the plaintiff and all three defendants. He submits the agreement pleaded between plaintiff and first defendant reflects the existence of a causal connection between the defendants. From the reading of all the agreements and following the chronology of the events in the particulars of claim the excipient can determine who is responsible for what and plead to this exception. If the first defendant cannot plead because the provisions of Rule 18(6) are lacking, then it must be stated accordingly in the plea.

[34] I find from a reading of the summons and the particulars of claim, that *ex facie* the pleadings, the main contract and all the necessary addendums to the main contract

[22] See Makali Plant & Construction (Pty)Ltd and Setheo Engineering (Pty) Ltd (96735/2016) [2018] ZAGPPHC 62 (20 February 2018) which citing with approval Gallagher Group Ltd and Another v 10 Tech Manufacturing (Pry) Ltd and Others 2014 (2) SA 157 (GNP) at par (20], citing with approval the decisions in Theunissen en Andere v Transvaale Lewendehawe Koop Bpk 1988 (2) SA 493 (A) at 500E -F, et al.

are properly referred to in the particulars of claim. In the plaintiff's particulars of claim the sequence of how the events unraveled can easily be followed, the nexus and the causal connection and links between all parties are clearly identified in the pleadings.

[35] Paragraph 5 of the particulars of claim refers to the agreement entered into between the plaintiff and the first defendant. That agreement was attached to the particulars of claim. The particulars of claim clearly identifies each defendant and what each of their responsibilities were.

[36] In paragraph 8 of the particulars of claim reference is made to the contract data EC, which is also attached to the summons.

[37] According to paragraph 9.4 of the particulars of claim, the excipient was identified as an agent, and the structural engineer.

[38] According to paragraphs 14 and 15, the allegations against the excipient are alluded to and then when one refers to paragraphs 27 to 30 it is apparent as to what case the second defendant has to meet. A reading of paragraphs 37 to 38 deals with the breaches by the defendants' being jointly and severally liable the one paying the other to be absolved.

[39] I accordingly find from a holistic reading of the pleadings, that the plaintiff has complied with rule 18(6). I am not persuaded that the excipient cannot plead to this exception. I find that the pleadings are not vague and do not embarrass nor prejudice the excipient; quite the contrary, the excipient knows very well the case it has to meet. Excipient must distinguish between the *facta probanda,* or primary factual allegations which every plaintiff must make, and the *facta probantia*, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for

particulars[23] for trial and even then are limited. For the rest, they are matters for evidence. Should the second defendant require any further particulars for preparation for trial that information may be requested

[40] This ground of exception is therefore dismissed.

THE SECOND GROUND OF EXCEPTION

[41] The excipient submits that the claims against first defendant and the excipient are not pleaded in the alternative.

[42] In response thereto, plaintiff's Counsel submitted concurrent claims in contract and delict are possible if the facts support both the contractual and delictual claims. Counsel for plaintiff submitted that the plaintiff made an election to procced on the contract in the main and in the alternative to proceed in delict as he was of the view it was relevant and alternative claims may exist. [24] He submitted further that the claims are pleaded in the alternative.

[43] The issue of alternative claims was discussed at length in *Trio Engineering Products and Pilot Crush Tec International (Pty) Ltd [25].* The Supreme Court of Appeal in *Holtzhausen v ABSA Bank Ltd 2008 (5) SA 630 (SCA) at 633 -634 emphasised that "Liillicrap[26] is not authority for the general proposition that an action cannot be brought in delict if a contractual claim is competent. The same facts may support an action in contract and in delict, permitting the plaintiff to elect which action to pursue, or to pursue each in the alternative".*

[23] Trope v South African Reserve Bank and Two Other Cases 1992 (3) SA 208 (T) at 2 11

[24] Liillicrap and Wassener v Pilkington Brothers 1885 (1) SA 475 (A) Holtzhausen and Absa Limited 2008 (5) SA, 360 SCA, Trio Engineered and Pilot Crush International 2019 (3) SA 580

[25] 2019(3)SA 580

[26] Ibid 24

[44] Excipient in its heads of argument, allege that the claims against the first and second defendants are not pleaded in the alternative. From the perusal of the summons and particulars of claim, reference to paragraph 22 and 28 provides the contractual claim against the first defendant and excipient and paragraph 23 and 29 provides for the delictual claims in the alternative. I find the submissions made by the excipient regarding the claims not pleaded in the alternative has no merit[27].

[45] Excipient submits further, that the installation complaint against first defendant and the design complaint against the excipient cannot be advanced simultaneously because they contain mutually destructive or contradictory averments. The excipient then proceeds to explain the two mutually contradictory versions in paragraph 42 to 47 of its heads of argument, dealing with substantive law to the effect that for the plaintiff to succeed with the installation complaint, it must prove that the design specifications were not defective and vice versa. Counsel for the excipient submits the (irreconcilable) hostility between the cases advanced by plaintiff is plain in that excipient does not understand the case it has to meet.

[46] In response thereto, the plaintiff submits there exists two obligations on the excipient, the first was to design the roof structure and the second was to inspect its works. There were sufficient particulars provided in this regard in that the design was faulty and the second defendant failed to properly inspect the works. The excipients can plead to this and it will be amplified at the hearing with evidence. The excipient may request further particulars if he contends that the allegations are not sufficient. Plaintiff submits that there is no merit in this ground of exception as it is of technical in nature.

[47] I am in agreement with plaintiff that from a contextual reading, excipients duties in so far as its involvement in the project was merely to design and to inspect the work done thereafter. If the excipient is able to distinguish between two mutually

[27] *Trio Engineering Products and Pilot Crush Tec International (Pty) Ltd ,Ibid 26*

contradictory versions, then the excipient can state this in his plea. I find that the issues raised in this exception is over- technical in nature and request for further particulars for trial or evidence can be led at the trial to cure any misconceptions that exist. I do not believe that this warrants an exception to be raised due to its technical nature. In the case of *Trans- African Insurance Co Ltd v Maluleka 1956 (2) SA 273* the court held " technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.

[48] I find that the excipient has failed to show vagueness amounting to embarrassment, and as such excipient failed to persuade me that the embarrassment amounts to serious prejudice[28] The second exception is accordingly dismissed.

THE THIRD GROUND OF EXCEPTION

[49] Excipient in this ground submits that plaintiff does not plead that the breaches of the agreement by excipient or the breaches of the alleged duty of care by the excipient, caused the damage suffered by it nor does it in consequence plead how such breaches are causally connected to the alleged loss. There are simply no allegations made by plaintiff which results in the case that excipient has to meet being incomprehensible. This complaint is exacerbated by Plaintiff's' failure to plead that it owned the Centre or that bore the risk of damage or loss to the Centre.

[50] In response thereto, the plaintiff's directed the court to the relevant paragraphs 34 and 38 read with paragraph 40 of the particulars of claim where it is evident that there is no merit in this exception. Plaintiff's counsel submitted that the excipient can plead to this averment. The excipient can answer by admitting or denying the averments in these paragraphs.

[28] Freedom Property Fund Ltd and another v Stavridis and Others [2018] 3 All SA 550 (ECG)

[51] He submitted further that the nature of excipients submission is that excipient will not be seriously prejudiced should the allegations not be expunged as per *Francis* and *Trope's* cases alluded to above.

[52] I agree with the plaintiff regarding this ground of exception. Paragraph 34 provides for the damages sustained by the plaintiff. Paragraph 37 provides for the damages that flow as a direct result of the defendants' failures and breaches and paragraph 38 provides as a consequent of the aforesaid, the plaintiff claims jointly and severally from the defendants, the one paying the other to be absolved.

[53] I find that in so far as this ground of exception is concerned, , it is not vague and it does disclose a cause of action . Consequently, the excipient is not embarrassed is prejudiced. I accordingly find that the third ground of exception is without merit and must also be dismissed

RULING

[54] In considering the matter in its totality, I find all three exceptions raised do not have any merit. I find that the particulars of claim set out a complete cause of action that can be answered by the excipient.

[55] I find that the excipient did not persuade me that the three exceptions raised are vague and embarrassing alternatively that they do not disclose a cause of action.

[56] Consequently, I find that the plaintiff's pleadings do not cause any embarrassment to the excipient and that the excipient is not prejudiced in any way and can plead to the plaintiff's particulars of claim.

ORDER

[57] In the result I make the following order.

[57.1] The excipient's first to third exceptions dated 29th January 2020 are dismissed with costs;

[57.2] The excipient is directed to file its plea to the plaintiff's particulars of claim within twenty (20) days from the date the judgment being uploaded on CaseLines.

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C. B. Bhoola
Acting Judge of the
High Court of South Africa
Gauteng Division, Pretoria

Delivered: This judgment was prepared and authored by the Judges whose names is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 08 July 2021.

APPEARANCES

Counsel for the Applicant	: Advocate A Govender
Instructed by	: Clyde and Co Attorneys
Counsel for the Respondent	: Advocate IL Posthumus
Instructed by	: Whalley and Van Der Lith Inc
Date of Hearing	: 25 May 2021
Date of Judgment	: 08 July 2021