



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 21939/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED
..... SIGNATURE
..... 20 OCTOBER 2023 DATE

In the matter between:

DG VAN DER MERWE

Plaintiff

and

TOP TECH FEEDS (PTY) LTD

First Defendant / Excipient

JOSÉ PAULO AGRELA

Second Defendant / Excipient

JUDGMENT

RETIEF J

INTRODUCTION

[1] The matter before me is an exception which has, previously been set down for adjudication. Twice in fact. Two orders appear to have been granted, the first order of the 29 July 2023 orders that the matter is to be adjourned, costs reserved and that Kuny J is to hear the matter. However, in an attempt to explain that the order was incorrect and so, as to what extent, Kuny J instead of recalling the order and amending the error/s, issued a ruling dated 04 August 2023. The ruling stated that the exception was to be heard *de novo*, and as such, the parties appear before me on this basis.

[2] The second order is a removal of matter on the 2 August 2023 in light of the order dated the 29 July 2023 but before the ruling. Both parties argue that the costs for both appearances should follow the result of this hearing. I deal with costs hereunder.

[3] The first and second Defendants [Defendants] raise a legal objection to the Plaintiff's particulars of claim by way of exception in terms of Rule 23. The purpose of an exception is to complain of a defect inherent in pleadings: admitting for a moment that all the allegations in a summons are true, the Defendants' exception must assert that even with such admission the pleadings does not disclose a cause of action.

[4] It follows then that when an exception is taken, the Court must look at the pleading as it stands: no facts outside of those stated in pleading can be brought into issue and no reference may be made to any other document. This is precisely the difference between an exception on the one hand and the plea in bar on the other. In order to succeed an excipient, in this case, the Defendants have the duty to persuade the court that upon every interpretation which the pleading in question

and in particular the document on which it is based can reasonably bear, no cause of action, failing this the exception ought not to be upheld.

[5] The object of an exception is to dispose of the case or a portion thereof in an expeditious manner or to protect a party against an embarrassment which is serious as to merit the costs even of an exception.

[6] Having now set the tone, it will be remiss of me not to affirm that an excipient, in this case, the Defendants, are to be held to their own pleading, their filed exception. The Defendants' Counsel handed up a third set of heads of argument at the commencement of the hearing. He indicated that the grounds of exception are to be dealt with in 4(four) categories. Bearing that I mind, I now turn to the Defendants' exception served on 23 June 2021. The 4 (four) distinct categories as they appear in the heads of argument, do not appear from the format of the exception. For that matter, the body of the exception does not, in format, refer to specific numbered and concise grounds dealt with in distinct paragraphs. Grounds however clumsily emerge which the Court is left to deal with.

[7] The Plaintiff raises the objection in argument of the non-compliance of rule 23(3) in their heads of argument, as against the manner in which the exception is drafted, but Counsel does not specifically argued the point and move for a dismissal based on the objection. In any event, as stated, as a whole grounds do emerged. I shall therefore attempt to deal with the Defendants' complaints by reference to the paragraphs in which they are appear in the exception itself. I reiterate that any new ground raised in the heads of argument or argued before me which does not accord exactly with the complaints raised and how raised in the Defendants' exception was not be entertained. The Defendants are held to their pleading.

[8] The majority of the grounds identified by this Court, save for the first and seventh ground, rely on the complaint that the allegations referred to are vague and embarrassing and that such allegations do not disclose a cause of action. None of the complaints aforesaid, are drafted in the alternative. In other words to succeed with grounds two to six, the Defendants must be able to demonstrate that the allegations referred to in the particulars of claim are both vague and embarrassing and do not disclose a cause of action to succeed with that particular ground.

[9] It is noteworthy that in as far as the Defendants rely on allegations being vague and embarrassing, in this case grounds one to six, the Defendants have not, *ex facie* the exception, afforded the Plaintiff the latitude provided for in rule 23(1) to, within 15 days, remove the complaint. No argument to the contrary was raised. A factor to be considered in respect of costs.

GROUND OF EXCEPTION

[10] The first complaint [paragraph 1 to paragraph 4.1] in essence appears to be a complaint that reference to the purchase price of Portion 255 pleaded in the particulars of claim does not accord with the purchase price in annexure "DV3", the corresponding annexure. "DV3" refers to a purchase price of R 900 000 and not R 2 500 000.00 as pleaded. The content of "DV3" is later, by reference, incorporated into the body of the pleading.

[11] The Defendants only complaint is that it is vague and embarrassing. Reading the pleading as a whole, I agree that it is confusing. For whatever embarrassment it may have caused for the Defendants did not apply the provisions of rule 23(1) notwithstanding such embarrassment.

[12] Instead, the Defendants attach a copy "E1" to drive the point home. It is trite in exception proceedings that no further documents are to be brought into issue. In consequence, the Court has not taken cognizance of the content of "E1" at this stage. The Defendants ground succeeds, albeit the "blemish" not serious having regard to the pleading as a whole. However, the Defendants by attaching "E1" is a factor for the Courts discretion in respect to cost.

[13] The Second complaint [paragraph 4.2-4.8], in essence appears to raise a complaint in respect of sufficient particularity pertaining to the exact amount paid for and or not secured in respect of the purchase price of Portion 255. Having regard to the pleading as a whole, the Plaintiff's cause of action relates to an already acknowledged amount (debt) in terms of "DV5". The insufficient particularity complained of appears to be of no moment having regard and accepting the Plaintiff's argument that paragraph 4 is pleaded as a background and does not go to allegations to sustain the cause of action. Both the Defendants complaints of vague and embarrassing and failure to disclose a cause of action, fail on the grounds relied on.

[14] The third complaint [paragraph 5], in essence appears to raise a complaint in respect of sufficient particularity pertaining to the exact amount paid off and or not secured in respect of the purchase price in respect of portion 256. Having regard to the pleading as a whole, the Plaintiff's cause of action relates to an already acknowledged amount (debt) in terms of "DV5". The insufficient particularity complained of appears to be of no moment having regard and accepting the Plaintiff's argument that paragraph 4 is pleaded as a background and does not go to allegations to sustain the cause of action.

[15] The Defendants to drive the point, attach and incorporate, by reference, a copy of "E2". In so far as "E2" does not accord with "DV2" or is mutually destructive regards content, the Court does not take cognisance thereof and repeats that it is trite in exception proceedings that no further documents are to be brought into issue. The Defendants attaching "E2" is a factor for costs. Both the Defendants complaints of vague and embarrassing and failure to disclose a cause of action, fail on the grounds relied on.

[16] The fourth complaint [paragraph 6] in essence, is a complaint that reference to "DV1" in respect of Portion 257. "DV1" refers to Portion 258. Reading the pleading as a whole, the pleader's intention is not to rely on "DV1" to sustain a cause of action (default of a payment of an indebtedness already acknowledged in "DV5"). However, it still remains confusing to the reader particularly when "DV1" is incorporated by reference. For whatever embarrassment it may have caused the Defendants did not apply the provisions of rule 23(1).

[17] The Defendants to succeed with this ground apart from the allegation being vague and embarrassing must demonstrate that no cause of action is disclosed. This they have failed to do so considering the formulation of the grounds relied on.

[18] The fifth complaint [paragraph 7 and 8]. Paragraph 7 merely refers to offers copies of offers to purchase DV1-DV3 and incorporates the content. No further allegations are made. Paragraph 7 does not purport to deal with a an agreement of bridging finance whether written or oral. In so far as the Defendant's complaints in paragraph 7 relates to bridging finance, the complaints are unclear vis a vis paragraph 7.

[19] Paragraph 8 however introduces the term "bridging finance". Paragraph 8 is clearly headed "THE FIRST ACKNOWLEDGEMENT OF DEBT." The term 'bridging finance' is introduced and is drafted in inverted commas, an indication to the reader that the term is used loosely. Reading the pleading as a whole it becomes clear that the first acknowledgement of debt, "DV4" which, in Afrikaans, clearly states that the amount of R1 560 000.00 is the "*hoofskuld verskuldig aan die krediteur* (the Plaintiff), *ten opsigte van 'n restant van koopprys op eiendomme*" – is the *causa* for the loan and that the terms of "DV4" are the terms of the loan arrangement: the means of 'bridging finance'. The heading 'Acknowledgement of Debt' appears to introduce the acknowledgement as the 'bridging finance' agreement.

[20] It appears that the Defendants accepted that there was a separate bridging loan and "DV4" and have raised complaints as against a purported 'bridging loan' agreement separate from "DV4" is misplaced. The Plaintiff's Counsel, who did not draft the pleading, argued that "DV4" confirms a bridging loan. One is not sure what to do with that argument but what is clear is that an amount of R 1 560 000.00 was acknowledged by the Defendants as a debt owing to the Plaintiff a debt which is not pleaded as the debt owing, nor is "DV4" the *causa* sustaining the present claim. In consequence the Defendants complaints raised as against the bridging finance is misplaced and must fail on the grounds raised.

[21] The sixth complaint [paragraph 8.4 to 8.7] appears to introduce another ground, that is failure by the Plaintiff to allege that it is a credit provider as stipulated in section 40 of the National Credit Act 34 of 2005 [NCA] in so far as it advance credit to the Defendants.

[22] If successful, the Defendants state that the Plaintiff has failed to disclose a cause of action as non-compliance with sec 40 read with sec 89 of the NCA renders the agreements relied on by the Plaintiff void and too, is vague and embarrassing.

[23] To unpack the complaint, the submission by the Plaintiff Counsel in argument is that the cause of action is to be read from paragraph 12 onwards of the particulars of claim and in effect only relates to the obligations integrated in terms of "DV5". However clumsily drafted this is apparent from the allegations an too that "DV5" substituted "DV4".

[24] Moving from this premise, the Plaintiff relying on the acknowledgement of debt entered into between the Defendants, the Plaintiff at paragraph 19, of its pleading, specifically pleads out the grounds upon which they rely that the NCA is not applicable. In other words, why the Plaintiff need not comply. The Court in an exception moves from the point that the allegation is true. The Court without having to test the veracity of any allegation at this stage does not need to venture into the nature or terms of "DV5" to ensure compliance to satisfy compliance of the NCA. In fact, this question is left for the trial court to adjudicate upon.

[25] The Defendants' Counsel is incorrect when he submitted to the Court that not granting the exception on this ground means that the Court will in effect give credence to unlawful circumstances. This contention is rejected, an exception is not a final determination of the proven facts before Court and it therefore, at this stage, does not finally dispose of an issue raised in exception. It is for that matter that a dismissal of an exception, save for an exception on jurisdiction, does not finally dispose of an issue and therefore a point is not pleadable and this point can be re-

argued at trial in the event that the exception is dismissed. In the premises the Defendant must fail on the ground relied on.

[26] The seventh ground, no reference to a paragraph is necessary as the Defendants raises an omission in that the Plaintiff failed to plea contractual /delictual damages. This is a confusing ground as the Plaintiff's claim is not for contractual damages as a result of breach but for specific performance of the payment of amounts acknowledged by the Defendants which have allegedly become due and payable. The Defendants reliance on this ground that it does not disclose a cause of action must fail.


COSTS

[27] I exercise my discretion considering factors relating to the outcome of the matter, this I weigh with the Defendant's compliance of Rule 23(1) and (2) and the seriousness of the successful complaints. I too, have considered the submissions advanced for costs in respect of the 2(two) previous appearances and in so doing will not entertain cost ruling for the 3 August 2023 in circumstances when both parties had insight to the functus order of the 29 July 2023.

[28] In the premises the following order is made:

- a) The First and Second Defendants' exception in respect of the first ground herein, on the ground basis of vague and embarrassing is upheld.

- b) The Plaintiff is afforded 15 (fifteen) days from date of this order to remove such complaint referred to in prayer 1 hereof.
- c) The First and Second Defendants' remaining grounds of exception (second, third, fourth, sixth and seventh) are dismissed.
- d) The First and Second Defendants are to pay the Plaintiff's costs, which costs include the 29 July 2022.


 L.A. RETIEF
 Judge of the High Court
 Gauteng Division

Appearances

Counsel for the Plaintiff:	Adv. DeWet Keet 082563 7264 dewetkeet@gmail.com
Instructed by:	DVDM Inc reception@vdmerweattorneys.co.za
Counsel for the Defendants:	Adv. JC Kloppe 083 556 6955 / 012 947 9000 hanneskloppe@clubadvocates.co.za
Instructed by:	JW WESSELS & Partners wessie@jww.co.za / michelle@jww.co.za
Date of hearing:	17 October 2023
Date of judgment:	20 October 2023