

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

REPORTABLE

CASE NO: 5217/2022P

In the matter between:

ALEXIA KOBUSCH

FIRST PLAINTIFF

WAYNE KOBUSCH

SECOND PLAINTIFF

WOOD-MOORE MANOR CC

THIRD PLAINTIFF

and

WENDY WHITEHEAD

DEFENDANT

JUDGMENT

MADONDO AJP

Introduction

[1] The plaintiffs are suing the defendant for damages allegedly suffered, arising out of the breach of a contract entered into between the first and second plaintiffs and the defendant; the delictual breach of a legal duty of care that the defendant owed to the plaintiffs; damages that the first plaintiff sustained as result of the defendant's defamatory statements; and for the payment of restitutional damages to the first to third plaintiffs for the patrimonial loss the plaintiffs suffered as a result of the diminished market value of horses on various dates during the years 2021 and 2022.

Parties

[2] The first plaintiff is Mr Alexia Kobusch, a major male chartered accountant of the United Arab Emirates.

[3] The second plaintiff is Mr Wayne Kobusch, a major businessman of the United Emirates.

[4] The third plaintiff is Wood-Moore Manor CC, a close corporation duly registered and incorporated in accordance with the provisions of the Close Corporations Act 69 of 1984, having its registered office at 569 Gallop Lane, Witpoort, Midrand. The first and second plaintiffs are its members. The first to third plaintiffs are hereinafter referred to as 'the plaintiffs'.

[5] The defendant is Ms Wendy Whitehead, a major female professional racehorse trainer, who carries on business as a sole proprietor under the name and style of 'Wendy Whitehead Racing Stables', having her principal place of business at the Summerveld Training Centre, JB McIntosh Drive, Summerveld, Shongweni, Durban.

Factual background

[6] On 22 April 2022, the plaintiffs issued a combined summons against the defendant, and the sheriff served it personally on the defendant on 25 April 2022. On 5 May 2022, the defendant delivered her notice of intention to defend the action. A plea

by the defendant was, in terms of Uniform rule 22(1), due for delivery by 2 June 2022. The defendant did not deliver her plea, as she was required to do.

[7] After the defendant's failure to deliver her plea by 2 June 2022, the plaintiffs on 8 June 2022 delivered a notice of bar in terms of Uniform rule 26 to the defendant, requiring the defendant to deliver her plea within five days of receipt of the notice, failing which the defendant would be in default of filing her plea and, consequently, *ipso facto* barred from doing so. The five-day period expired on 15 June 2022.

[8] Instead of delivering a plea, the defendant on 9 June 2022 delivered a notice to except to the plaintiffs' particulars of claim in terms of Uniform rule 23(1) and a notice to strike out in terms of Uniform rule 23(2), calling upon the plaintiffs to remove such causes of complaint within 15 days. The defendant delivered an exception on two bases, namely that the plaintiffs' particulars lacked averments necessary to sustain a cause of action, and, that the pleading was vague and embarrassing.

[9] On 23 June 2022, in response to the defendant's notice to except and notice to strike out, the plaintiffs delivered a notice of an irregular step in accordance with Uniform rule 30(2)(b), calling upon the defendant to remove the cause of complaint set forth therein within ten days. The 10-day period expired on 7 July 2022.

[10] The causes of complaint set out in the plaintiffs' rule 30 notice are the following:

- (a) The defendant's notice in terms of rule 23 was not delivered within 10 days of receipt of the summons as determined in rule 23(1)(a) and rule 23(2);
- (b) The defendant's rule 23 notice is neither a plea nor an exception provided for in rule 22(1); and
- (c) The delivery of the rule 23 notice consequently constituted an irregular step and the defendant is *ipso facto* barred from filing a pleading.

[11] On 6 July 2022, the defendant delivered an exception. On 7 July 2022, the defendant set down the exception for hearing in terms of rule 6(5) (f). On 25 July 2022,

the plaintiffs delivered the irregular step application and supporting affidavit in terms of Uniform rule 30. In such application, the plaintiffs sought an order:

- (a) Declaring the defendant's notice to remove the cause of complaint in terms of rule 23(1)(a) and her notice to strike out in terms of rule 23(2), dated 9 June 2022, irregular;
- (b) That the defendant's rule 23 notice be set aside; and
- (c) That the defendant pays the costs of the application.

[12] The plaintiffs' contention is that the defendant's rule 23 notice constitutes an irregular step and does not comply with the requirements of Uniform rule 23(1)(a) and rule 23(2)(a) on the ground that the defendant failed to serve her rule 23 notice and a notice to strike out within the peremptory time limits prescribed by rule 23(1)(a) and 23(2)(a), respectively. Consequently, the plaintiffs seek an order setting aside the rule 23 notice as an irregular step.

Issues

[13] The issues raised by the pleadings and argument in this matter are:

- (a) Whether the defendant's notice of exception brought in terms of rule 23(1)(a) and 23(2)(a) is a valid response to the notice of bar in terms of rule 26;
- (b) Whether the notice of exception and the exception were out of time; and
- (c) Whether the plaintiffs' particulars of claim are excipiable.

Analysis

Notice of exception

[14] Under this heading, I am asked to determine whether an exception in its generic form is an appropriate reply to a notice of bar. The question whether a notice of exception is a proper response to a notice of bar has been the subject of determination by various divisions, save for KwaZulu-Natal, and there has been a difference of judicial opinion in this regard in the other provinces.

[15] In *McNally NO v Codron and others*,¹ Yekiso J took the view that the notice of exception itself is not a plea whereas the exception is a plea. He went on to state that while filing an exception is a proper response to the notice of bar, a notice to except is not.²

[16] In *Hill NO v Brown*,³ Rogers J held a rule 23(1)(a) notice not to be a response to a notice of bar. The defendant, if he wishes to oppose the case, will have, on good cause shown, to apply in terms of rule 27 to have the bar lifted.⁴ This case was cited with approval in *Van Zyl NO and another v Smit*.⁵

[17] In *Felix and another v Nortier NO and others (2)*,⁶ the court held that the filing of a notice of exception, which is a peremptory requirement where it is alleged that the pleading is vague and embarrassing, is permitted. Leach J held that a defendant is entitled to file a notice of exception upon receipt of bar.⁷

[18] In *Tuffsan Investments 1088 (Pty) Ltd v Sethole and another*,⁸ Van der Westhuizen AJ subscribed to the findings arrived at in *Felix* and in *Landmark Mthatha* with regard to a notice of exception being a pleading and held:

‘25. . . . To hold the contrary, as in *McNally, supra*, would disentitle a party after the initial period of 20 days within which to file an exception where the pleading is vague and embarrassing to thereafter take such an exception. Such party would have difficulty in pleading to the vague and embarrassing allegations. It is trite that the very purpose of pleadings is to crystallize the issues in dispute.

¹ *McNally NO and others v Codron and others* [2012] ZAWCHC 17.

² *Ibid* para 24-26.

³ *Hill NO and another v Brown* [2020] ZAWCHC 61.

⁴ *Ibid* para 13.

⁵ *Van Zyl NO and another v Smit* [2021] ZAGPPHC 499.

⁶ *Felix and another v Nortier NO and others (2)* 1994 (4) SA 502 (SE) at 506E.

⁷ *Felix* was followed in *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality and others: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd and others* 2010 (3) SA 81 (ECM) para 13.

⁸ *Tuffsan Investments 1088 (Pty) Ltd v Sethole and another* [2016] ZAGPPHC 653 paras 25–26.

26. It follows that the defendants were entitled to serve a notice in terms of Rule 23(1) within the period allotted in the notice of bar.’ (Footnote omitted.)

[19] In *Steve’s Wrought Iron Works v Nelson Mandela Metro*,⁹ Goosen J also deviated from *McNally* which

‘precludes a party who intends to object to a pleading on the basis that it is vague and embarrassing from taking such exception upon receipt of a notice of bar unless that party had filed such notice of intention to except within the initial period allowed for the filing of a plea.’

Goosen J went on to hold that ‘[s]uch construction of rule 23(1) . . . would defeat the purpose to be served by the process of excepting to a pleading’.¹⁰

[20] It has been held that

‘where a defendant, in response to a notice of bar, delivers an exception, he has taken the next procedural step in the matter and has thus complied with the demand made in the notice on pain of bar. In this regard, it has been held that an exception is in fact a pleading and thus falls squarely within the wording of rule 26.’¹¹ (Footnote omitted.)

[21] ‘Rule 23 prescribes the form of the exception as a pleading’.¹² An exception is a legal objection to a defect in the opponent’s pleading.¹³ ‘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 so serious as to merit the costs even of an exception.’¹⁴

⁹ *Steve’s Wrought Iron Works and others v Nelson Mandela Metro* 2020 (3) SA 535 (ECP) para 18.

¹⁰ Ibid.

¹¹ *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality and others: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd and others* 2010 (3) SA 81 (ECM) para 13.

¹² *Steve’s Wrought Iron Works and others v Nelson Mandela Metro* 2020 (3) SA 535 (ECP) para 21.

¹³ *Champion v JD Celliers and Co Ltd* 1904 TS 788 at 790-791; *Makgae v Sentra Boer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244H-245A per Ackerman J.

¹⁴ DE van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* (RS 18, 2022) at D1-296 (hereinafter referred to as ‘*Erasmus*’), referencing amongst others *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553F-I; *Mtsetwa v Minister of Health* 1989 (3) SA 600 (D) at 604B-C; *Pretorius and another v Transport Pension Fund and others* [2018] ZACC 10; 2019 (2) SA 37 (CC) at 44F-G; *Brocsand (Pty) Ltd v Tip Trans Resources and others* [2020] ZASCA 144; 2021 (5) SA 457 (SCA).

[22] 'An exception should be dealt with sensibly and not in an over-technical manner'.¹⁵ 'An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is [designed] to weed out cases without legal merit'.¹⁶ An exception may be taken to protect oneself against embarrassment.¹⁷

[23] Particulars of claim that do not disclose a cause of action, and which are vague and embarrassing, do not permit a defendant to plead as required in terms of the Uniform rules. The effect of such particulars of claim renders the defendant unable to plead effectively to them, which defeats the purposes of Uniform rules 18 and 22. Defences must be pleaded separately and distinctly as separate causes of action. Particulars of claim that lack the necessary averments to sustain a cause of action and those that are vague and embarrassing, do not allow the defendant to achieve such objective. In such circumstances, an exception is a solution and is inevitable. Disallowing a notice of exception or an exception, in the circumstances, would defeat the purpose of the relevant rules.

[24] Rule 22(2) requires a 'defendant to give a fair and clear answer to every point of substance raised by the plaintiff in his declaration or particulars of claim, by frankly admitting or explicitly denying (or confessing and avoiding) every material matter alleged against him'.¹⁸

[25] This objective cannot be achieved if the particulars of claim lack averments necessary to sustain a cause of action or where they are vague and embarrassing. Rule 22(3) makes it clear that every allegation of fact in the combined summons or declaration, which is not denied or admitted in the plea, shall be deemed to be admitted.

[26] It has been held that:

¹⁵ *Erasmus* at D1-298A, referencing amongst others *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at 465H.

¹⁶ *Living Hands (Pty) Ltd and another v Ditz and others* 2013 (2) SA 368 (GSJ) para 15(e).

¹⁷ *General Commercial and Industrial Finance Corp Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 454-455.

¹⁸ *Erasmus* at D1-260, referencing *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 542B; *Makhwelo v Minister of Safety and Security* 2017 (1) SA 274 (GJ) at 276G-H.

'If a pleading both fails to comply with the provisions of rule 18 and is vague and embarrassing, the defendant has a choice of remedies: he may either bring an application in terms of rule 30 to have the pleading set aside as an irregular step, or raise an exception in terms of rule 23(1).'

¹⁹ (Footnotes omitted.)

If the fact of *non-locus standi in judicio* appears from the summons, 'the defendant is entitled to except to the summons on the ground that no cause of action is disclosed'.

²⁰

If a party is of the opinion that his opponent has failed to remove the cause of complaint, he or she is entitled within ten days after receipt of his or her opponent's reply to his or her notice to deliver his exception. However, 'he is not entitled to except and at the same time to apply in terms of rule 30(1) for his opponent's reply to his notice to be struck out'.

²¹

[27] 'If an exception will have the effect of putting an end to the action it is a party's duty to except, and not wait until the trial before raising the point in issue'.

²² An exception, in my view, is an act, which advances the proceedings one stage nearer to completion, and so is a notice of exception, particularly, when it is peremptorily filed as a precursor to the filing as an exception.

[28] In this matter, when the defendant in response to a notice of bar delivered a rule 23(1) notice, she took the next procedural step in the matter and has thus complied with the Uniform rules. In the premises, the defendant's rule 23(1) notice constituted a proper response to the notice of bar, except where it is contended that the pleading was vague and embarrassing and the notice of exception in question has not within 10 days of the receipt of a combined summons been filed, as prescribed by rule 23(1)(a) and rule 23(2)(a).

Was the notice of exception and the exception out of time?

¹⁹ *Erasmus* at D1-301, referencing *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 469F-J.

²⁰ *Erasmus* at D1-309, referencing *Gallo Africa Ltd and others v Sting Music (Pty) Ltd and others* [2010] ZASCA 96; 2010 (6) SA 329 (SCA) at 331I–332B.

²¹ *Erasmus* at D1-310B.

²² *Erasmus* at D1-310.

[29] Rule 22(1) provides:

‘(1) Where a defendant has delivered notice of intention to defend, he shall within 20 days after the service upon him of a declaration or within 20 days after delivery of such notice in respect of a combined summons, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out.’

[30] In terms of rule 22(1), the defendant in the present matter was required to file her plea within 20 days of the delivery of her notice of intention to defend. The defendant failed to file her plea during the period allowed, and, consequently, the plaintiffs issued a notice of bar in terms of rule 26, barring the defendant from filing any further plea or process.

[31] The plaintiffs contend that the 31-day period taken by the defendant to serve her rule 23 notice constitutes a substantial degree of non-compliance with rule 23(1)(a) and rule 23(2)(a), regard being had to the disproportionate 31-day period in relation to the reasonable 10-day period afforded to the defendant in terms of rule 23. The plaintiffs, accordingly, submit that the degree of the defendant’s non-compliance with rules 23(1)(a) and rule 23(2)(a) gives rise to the inference that the defendant recklessly disregarded the strict time periods provided therein.

[32] Uniform rule 23(1) and (2) provides that:

‘23 Exceptions and applications to strike out

(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that—

(a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the

pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and

(b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.

(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter, and may set such application down for hearing within five days of expiry of the time limit for the delivery of an answering affidavit or, if an answering affidavit is delivered, within five days after the delivery of a replying affidavit or expiry of the time limit for delivery of a replying affidavit, referred to in rule 6 (5) (f): Provided that—

(a) the party intending to make an application to strike out shall, by notice delivered within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of delivery of the notice of intention to strike out; and

(b) the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted.'

Pleading not disclosing a cause of action

[33] In terms of rule 23(1) an exception brought on the ground that a pleading lacks averments necessary to sustain an action or defence, may be filed within the period allowed for the filing of any subsequent pleading. In the case of an exception on the ground that a pleading is vague and embarrassing, rule 23(1)(a) must be complied with before an exception on that ground could be delivered in terms of rule 23(1)(b). In the absence of any condonation for the late filing of the notice of exception on the ground that the pleading is vague and embarrassing, such a notice constitutes an irregular step.

[34] The time periods within which pleadings subsequent to a declaration or particulars of claim must be delivered are dealt with under rule 22 (plea) and rule 24(1)

(claim in reconvention). If a defendant intends to deliver an exception to the plaintiff's particulars of claim, it must do so within the period allowed for a plea, otherwise it will be out of time. The court may on good cause shown, extend the period for the delivery of the plea.²³

[35] Failure to deliver a plea within the time stated does not entail an automatic bar. Since an exception is a pleading, a notice of bar in terms of rule 26 is required before the plaintiff can object to an exception on the ground that it was delivered out of time.²⁴ Rule 26 provides:

'26. Failure to deliver pleadings – barring

Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be *ipso facto* barred. If any party fails to deliver any other pleading within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within 5 days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties shall be in default of filing such pleading, and *ipso facto* barred. . . '

[36] Mr Crampton, for the plaintiffs, argued that the defendant did not take any action within the five-day notice of bar and that she consequently became *ipso facto* barred, which meant that she was not permitted to proceed with the exception. The defendant therefore could not proceed with the exception without having obtained condonation, as she filed her notice of exception out of time.

[37] A party is only *ipso facto* barred upon the failure to deliver a replication or subsequent pleading within the time stipulated in the Uniform rules. In the case of all other pleadings, the bar occurs upon the lapse of the notice period provided in rule 26

²³ *Feldman v Feldman* 1986 (1) SA 449 (T).

²⁴ *Tyulu and others v Southern Insurance Association Ltd* 1974 (3) SA 726 (E); *Felix and another v Nortier NO and others* (2) 1994 (4) SA 502 (SE) at 506E; *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality and others: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd and others* 2010 (3) SA 81 (ECM) at 86G; *Hill NO and another v Brown* [2020] ZAWCHC 61 para 4-8.

i.e. within five days after receipt of the notice. 'If within the five-day period a pleading which the party is entitled to file is filed, there is no bar.'²⁵ However, in the absence of condonation for the late filing of a rule 23(1)(a) notice and a rule 23(2)(a) notice or an application to lift the bar, filing the notice within the period allotted in the bar does not cure a procedural defect in the notice of exception and the exception brought on the ground that the pleading is vague and embarrassing and that the notice to strike out has been filed out of the prescribed time limit.

[38] Upon a proper construction of rule 23(1), the notice of bar in this matter was only applicable to the exception on the ground that the plaintiffs' particulars of claim do not contain sufficient averments necessary to sustain a cause of action. Rule 23(1) provides that an exception on such ground may be filed 'within the period allowed for filing any subsequent pleading'. When the defendant filed her rule 23(1) notice on 9 June 2022, the defendant was still within the five-day notice of bar period as the fifth day only lapsed on 15 June 2022.²⁶ The defendant filed an exception to the plaintiffs' particulars of claim on 6 July 2022. This was still within 10 days of the defendant's receipt of the plaintiffs' reply to the defendant's notice of exception. Furthermore, the period allowed for the filing of a replication had not expired; it only expired on 15 July 2022. Both the notice of exception and an exception on the ground that the pleading lacked averments which are necessary to sustain a cause of action, were both timeously delivered, that is, within the period provided for in the notice of bar and within the period allowed for filing any subsequent pleading.

Vague and embarrassing

[39] If the statement is vague, it is either meaningless or capable of more than one meaning. To put it at its simplest, a reader must be able to distil 'from the statement a

²⁵ *Steve's Wrought Iron Works and others v Nelson Mandela Metro* 2020 (3) SA 535 (ECP) para 13. See also *Tyulu and others v Southern Insurance Association Ltd* 1974 (3) SA 726 (E).

²⁶ See also *Kramer Weihmann and Joubert Inc v South African Commercial Catering and Allied Workers Union (SACCAWU)* [2012] ZAFSHC 152.

clear, single meaning'.²⁷ An embarrassment occurs where in pleading averments, which are contradictory, are not pleaded in the alternative.²⁸ If a 'pleading fails to comply with the provisions of rule 18 and is vague and embarrassing, the defendant has a choice of remedies: he may either bring an application in terms of rule 30 to have the pleading set aside as an irregular step, or raise an exception in terms of rule 23(1).'²⁹

[40] The crucial distinction between rule 23(1) and rule 30 is that an exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded, whereas '[r]ule 30 may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity [in that latter instance] it is not necessary that the failure to plead material facts goes to the root of the cause of action'.³⁰

[41] Where a party intends to take an exception that a pleading is vague and embarrassing such party must, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of such notice.³¹ If the cause of complaint is not removed within the stipulated period, the excipient must deliver the exception.

[42] The peremptory filing of the notice by the excipient within 10 days of receipt of the combined summons, affording his or her opponent an opportunity to remove the cause of complaint, is a condition precedent to the taking of an exception that a pleading is vague and embarrassing.³² Failure to comply with such peremptory

²⁷ *Venter and others NNO v Barret Venter and others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) para 11.

²⁸ *Trope v South African Reserve Bank and another and two other cases* 1992 (3) SA 208 (T) at 211E; *Bendew Trading v Sihle Property Developers and Plant Hire* [2021] ZAMPMBHC 37 para 16.

²⁹ *Erasmus* at D1-301, referencing amongst others *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 469F-J.

³⁰ *Hill NO v Strauss* [2021] ZAGPJHC 77 para 19.

³¹ Rule 23(1)(a).

³² See *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 753F.

requirements, in the absence of an application for condonation for the non-compliance with the 10-day period constitutes an irregular step.

[43] In the present matter, the defendant failed to file her rule 23(1) notice alleging that the plaintiffs' particulars of claim are vague and embarrassing, and did not bring an application to strike out within 10 days of receipt of the combined summons, as required. Since the defendant has not lodged any application for condonation for non-compliance with the 10-day period, such failure constitutes an irregular step, justifying the setting aside of such step in whole or in part. If the defendant intends to pursue such exception and application to strike out, she will, on good cause shown, have to apply for condonation for non-compliance with rule 23(1)(a) and rule 23(2)(a) of the Uniform Rules, or have to apply to have the bar lifted in terms of rule 27.

Are the plaintiffs' particulars of claim excipiable?

[44] In the circumstances of this case, only the exception on the ground that the plaintiffs' particulars of claim lack averments necessary to sustain a cause of action warrants consideration by this court. In order for an exception to succeed, the excipient has a duty, firstly, to persuade the court that upon every interpretation, which the particulars of claim could reasonably bear, no cause of action is disclosed. Put simply, the excipient must establish that the pleading is excipiable on every interpretation that reasonably could be attached to it.³³ Secondly, the excipient needs to satisfy the court that it would be seriously prejudiced in the event that the exception should not be upheld.³⁴ The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.³⁵

[45] I now turn to consider whether the plaintiffs' particulars of claim are excipiable, in that they lack averments necessary to sustain a cause of action. The pleading must be looked at as a whole.³⁶

³³ See *Francis v Sharp and others* 2004 (3) SA 230 (C) at 237F-G.

³⁴ *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A.

³⁵ *Erasmus* at D1-302. See also *Van Zyl NO and another v Smit* [2021] ZAGPPHC 499 para 18.

³⁶ *Nel and others NNO v McArthur and others* 2003 (4) SA 142 (T) at 149F.

[46] In *Salzmann v Holmes*,³⁷ Innes JA defined an exception as follows:

‘An exception goes to the root of the entire claim or defence, as the case may be. The excipient alleges that the pleading objected to, taken as it stands, is legally invalid for its purpose.’

The ‘exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim *is* (not may be) bad in law’.³⁸

[47] An excipient must state in clear and concise terms the particulars upon which his or her exception is based, for ‘it is not sufficient merely to state that the summons discloses no cause of action. . .’³⁹ ‘It is for the party instituting proceedings to allege and prove that he has *locus standi in judicio*.’⁴⁰

[48] The question that then arises in the present matter is whether the plaintiffs’ particulars of claim contain sufficient particularity to sustain a cause of action. It has been argued on behalf of the defendant that the plaintiffs’ particulars of claim lack averments necessary to establish that the plaintiffs have locus standi in respect of each of their distinct and separate causes of action: the plaintiffs allege that the first and second plaintiffs are members of the third plaintiff; the third plaintiff is the registered owner and breeder of the horses and the first and second plaintiffs lease the horses from the third plaintiff. However, there are no averments as to the basis on which the first and second plaintiffs allegedly leased the horses from the third plaintiff, and whether the first and second plaintiffs have the necessary authority from the third plaintiff to enter into any agreements in relation to the horses. In addition, it is not clear whether the first and second plaintiffs are acting as agents on behalf of the third plaintiff

³⁷ *Salzmann v Holmes* 1914 AD 152 at 156.

³⁸ *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] 3 All SA 350 (A) para 7.

³⁹ *Erasmus* at D1-310E, referencing amongst others *Molteno Bros v South African Railways* 1936 AD 408 at 417; *Sydney Clow & Co Ltd v Munnik and another* 1965 (1) SA 626 (A) at 634G; *Cook and others v Muller* 1973 (2) SA 240 (N) at 244A-C.

⁴⁰ *Erasmus* at D1-282, referencing *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575 H-J; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1057G-H.

or on their own. It is not clear whether the plaintiffs' claim is of a contractual or a delictual nature.

[49] It appears *ex facie* the plaintiffs' particulars of claim that the plaintiffs have failed to make averments in respect of: the date on which the alleged lease agreement was entered into; who the parties to the agreement were and what the material terms of the agreement were; no allegation is made that such agreement was breached; when, how, and whether the plaintiffs suffered damages as a result; nor have the plaintiffs pleaded facts and principles of law relating to the first and second plaintiffs' delictual claim against the defendant, and the claim arising from the lien.

[50] Counsel for the plaintiffs did not address this court on the excipiability of the plaintiffs' particulars of claim either on the ground that such particulars lack averments necessary to sustain a cause of action or on the ground that the pleading is vague and embarrassing. He rested his case on the procedural validity of the exception as a decisive factor. Therefore, the defendant's contention in this regard has gone unchallenged. It is not in dispute that the plaintiffs' particulars of claim lack clear, concise and adequate material facts upon which the plaintiffs rely for their claim and to which the defendant may meaningfully plead. The particularities outlined by the defendant as supporting her allegation that the plaintiffs' particulars of claim lack averments necessary to sustain a cause of action, are sufficient. Had it not been for the fact that the defendant failed to comply with the peremptory provisions of rule 23(1)(a) and rule 23(2)(a), in that she filed her notice of exception on the ground that the pleading is vague and embarrassing out of the 10-day period prescribed therein, such contention by the defendant would have been upheld. This also finds support in that the plaintiffs have not challenged such contention by the defendant at all.

Conclusion

[51] Inevitably, this court should uphold the exception on the ground that the plaintiffs' pleading lack averments necessary to sustain a cause of action and grant the plaintiffs leave to amend their particulars of claim. I hope that the plaintiffs will avail themselves

of this opportunity to amend their particulars, also in other respects, as they lack the necessary particularities of their claims and are vague in such a way, in my view, that they are so defective as to constitute a nullity.⁴¹ Such a step by the plaintiffs will help obviate unnecessary costs and save time. Such a step will not prejudice the plaintiffs but benefit them.

Costs

[52] The defendant has succeeded in part and the excipiability of the plaintiffs' particulars of claim on all grounds have not been challenged at all. The plaintiffs have only succeeded, in part, on the basis of non-compliance with the peremptory provisions in that the defendant filed the notice of exception and the notice to strike out, out of the prescribed time limits. In other words, the plaintiffs succeeded on technical grounds rather than on the merits. The defendant has succeeded in establishing that in the present nature and state of the plaintiffs' particulars of claim; she has serious difficulty in properly pleading her defence. Since the plaintiffs could not show that their particulars of claim are not defective and are not excipiable, I deem it appropriate, fair, and just to award costs in favour of the defendant. Although the defendant may be faulted for her delay in filing a notice of exception within ten days of the receipt of the combined summons, it appears from the nature of the plaintiffs' particulars of claim that the defendant had a valid reason for filing a notice of exception and exception. I am, therefore, satisfied that the defendant intended merely to make full use of the remedies that the rules provided her, rather than to flagrantly flout the rules.

Order

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

1. The exception, on the ground that the plaintiffs' particulars of claim lack averments necessary to sustain a cause of action, is upheld;
2. The notice of exception and exception on the ground that the pleading is vague and embarrassing is set aside as an irregular proceeding;

⁴¹ Obiter remarks of Cloete J in *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 473B-D.

3. The plaintiffs are afforded twenty (20) days from the date of this order to amend their particulars of claim, failing which the defendant is granted leave to approach this court on notice to the plaintiffs for an order dismissing the claim with costs.

4. The plaintiffs are jointly and severally ordered to pay the costs of the application.

MADONDO AJP

Date reserved: 29 November 2022

Date delivered: 15 December 2022

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