REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 3389/2021
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED: YES/NO
SIGNATURE:
DATE: 24 MARCH 2023

In the matter between:

ZERBATONE MINING (PTY) LTD **PLAINTIFF/RESPONDENT**

And

DWARSRIVIER CHROME MINE (PTY) LTD **DEFENDANT/APPLICANT**

JUDGMENT

MDHLULI AJ

[1] This is an opposed exception by the Applicant to the Respondent's particulars of claim on the basis that the particulars do not disclose a cause of action against the Applicant. The Applicant around July 2021 served and issued a notice in terms of Rule 23(1) of the Uniform Rules of Court on more or less the same grounds as in this exception affording the Respondent to remove the cause of complaints Respondent filed its notice to amend the particulars in terms of Rule 28 which was not objected to. Around November 2021 the

Respondent served and filed the amended particulars of claim in respect to paragraphs 4, 16, 17, 26, 33, 34 and 40 which are to be incorporated in the main particulars and thus both a subject for exception before this court.

[2] The exception is based on seven grounds, all of which in support of the complaint that the particulars of claim do not disclose a cause of action. I shall deal with them herein under. The Applicant and the Respondent have concluded several contracts between themselves for amongst others provision of services to the Applicant. The Applicant terminated the contract by notice as per the contract. The termination thereof is the root of the dispute/s between the parties.

[3] The Applicant is DWARSRIVIER CHROME MINE (PTY) LTD, a mining company duly incorporated with limited liability in accordance with the provisions of the company laws of South Africa, with registration number 2[...] and having its principal place of business at Farm D[...] 3[...], S[...] Road, Steelpoort, Limpopo.

[4] The Respondent is ZERBATONE MINING (PTY) LTD a company duly incorporated with limited liability in accordance with the provisions of the company laws of South Africa, with registration number 2[...] and having its registered office at 0[…] M[...] Complex, L[...], Limpopo and its principal place of business at 1[...] Unit […], O[...] M[...] Building, L[...], Limpopo.

[5] It is worth mentioning that the Respondent's heads were headed up during argument in this matter. Furthermore, Applicant's counsel also had no sight of this heads at the time of the argument.

[6] The following are the grounds upon which the Applicant basis its exception:

6.1 <u>FIRST GROUND</u>

6.1.1 In paragraph 26 of the particulars of claim, the plaintiff pleads that the defendant terminated the agreement between them, in terms of clause

20 of the main agreement.

6.1.2 In paragraph 27 of the particulars of claim, the plaintiff pleads that the defendant's termination of the main agreement (with reliance on clause 20 of the main agreement) was unlawful. The basis of this allegation is that clause 20 of the main agreement is illegal, invalid and no force and effect.

6.1.3 The plaintiff pleads that clause 20 of the main agreement is illegal, invalid and of no force and effect, for essential two reasons:

6.1.3.1 the first is that the defendant is bound by clauses 2.2.2 and

2.2.4 of the Mining Charter and in essence that these provisions of the Mining Charter, or the Mining Charter read as a whole, precluded the termination of the main agreement any time prior to 30 November 2021 without good and valid reasons; and

6.1.3.2 the second is that clause 20 of the main agreement is in conflict with clauses 22 of the same agreement.

6.1.4 In relation to the first reason that is premised on the Mining Charter (as pleaded in paragraphs 26.'I to 26.3, read with paragraphs 26.8 and 26.9, of the amended particulars of claim), the plaintiff does not plead provision in the Mining Charter that prohibits a no fault termination clause on notice (such clause 20 of the main agreement). The plaintiff pleads only that the Mining Charter provided for fixed term contracts, but does not plead that any specific provision of the Mining Charter prohibits agreement between the parties that such fixed term contracts may be terminated on notice prior to their expiry.

6.1.5 With respect to the second reason: clauses 20 and 22 of the main agreement deal with different subject matters as follows:

6.1.5.1 Clause 20 deals with termination of the agreement at the defendant's option and upon the giving of written notice (i.e. termination for convenience or for no fault); and

6.1.5.2 Clause 22 deals with termination of the agreement for inter alia breach.

6.1.6 There is therefore no conflict between clauses 20 and 22 resulting in any illegality, invalidity or lack of force and effect of clause 20.

6.1.7 In the premises, the plaintiff's amended particulars of claim fail to disclose a cause of action against the defendant.

6.2 SECOND GROUND

6.2.1 In paragraph 26.8 of the amended particulars of claim, the plaintiff that: "it was material express, implied or tacit term of the main agreement, as amended, that the main agreement would not be terminated by either 'party without good and valid reason prior to the expiry of the instalment agreement of 30 November 2021".

6.2.2 The plaintiff does not plead:

6.2.2.1 The express terms of the agreement that alleges, especially in the light of clause 20 and clauses 26.1 and 26.2 of the main agreement, which provide to the contrary; and/or

6.2.2.2 The conduct from which the tacit terms of the main agreement may be inferred, especially in the light of clause 20 and clauses 26.1 and 26.2 of the main agreement, which directly conflict with such a tacit term and leaves no room to infer any such alleged tacit term.

6.2.3 In the premises, the plaintiff's amended particulars of claim fail to disclose a cause of action against the defendant.

6.3 THIRD GROUND

6.3.1 In paragraph 16.6, read with the preamble in paragraph 16 of the particulars of claim, the plaintiff pleads that it was a term of the agreement that the defendant would (at its costs) provide the plaintiff with two LHD machines, which would be used by the plaintiff to provide services to the defendant in terms of the main agreement.

6.3.2 In paragraph 16.7, read with the preamble in paragraph 16 of the particulars of claim, the plaintiff pleads that: *"As agreed in the 2018 amendment, the Defendant would purchase* a *new LHD ("LHD 60") for the Plaintiffs use in providing the services required in terms of the main agreement, as amended; the Plaintiff would pay the sum of R177* 000.00 *per month to the Defendant, after which ownership would be transferred by the Defendant to the Plaintiff,-(referred to below as "the instalment agreement)."*

6.3.3 In paragraph 16.9 of the amended particulars of claim, the plaintiff pleads that it was agreed in the 2021 amendment that: *"16.9.1 The Plaintiff requested* a *four-month extension to the main agreement because of the loss of production it had sustained during the Covid-19 lockdown declared from March* 2020;

16.9.2 The Defendant required additional services, to be provided by the Plaintiff in terms of the main agreement;

16.9.3 The Defendant required a more defined repayment schedule to [...] with the instalment payable in terms of the instalment agreement were increased to the sum of R150 428.57 per month, so that the final

statement would be paid by 30 November 2021;

16.9.4 It was a *material express, implied or tacit term that the main agreement, as amended, would not be terminated by either party, without good and valid reason, prior to the expiry of the instalment agreement on 30 November 2021; and*

*16.9.*5 *It was* a *material express, implied or tacit term that the instalment agreement would not be terminated by either party without good and valid reason, prior to the final instalment being paid on 30 November 2021."*

6.3.4 In the paragraph 33 of the amended particulars of claim (as an alternative to the claim regarding the National Credit Act of **2005("NCA claim")** that the defendant prematurely terminated the main agreement, and that this in turn caused the premature termination of the instalment agreement. The plaintiff pleads further that the consequent termination of the instalment agreement was unlawful and invalid because:

"33.1 The Plaintiff and the Defendant had concluded two fixed term contracts, being the main agreement, as amended, and the instalment agreement, both of which were due to expire on 30 November 2021. The existence of the instalment agreement was, at all material times and to the knowledge of the parties, dependent on the existence of the main agreement, as *amended.*

33.2 It was a *material express, implies or tacit of the main agreement,* as *amended, that the main agreement would not be terminated by either party, without good and valid reason, prior to the expiry of the instalment agreement on 30 November 2021.*

33.3 It was a *material express, implied or tacit term of the main agreement,* as *amended, that the instalment agreement would not be terminated by either party, without good and valid reason, prior to the final*

instalment being paid on 30 November 2021."

6.3.5 The plaintiff does not plead that:

6.3.5.1 The 2021 amendment created new agreement which was wholly detached from the terms of the main agreement, and which therefore established new terms and conditions;

6.3.5.2 The express terms of the agreement that alleges in paragraphs 16.9.4 and 16.9.5, as well as in paragraphs 33.2 and 33.3; and/or

6.3.5.3 The conduct or facts from which the tacit terms (as alleged in paragraphs 16.9.4 and 16.9.5, as well as in paragraphs 33.2 and 33.3) may be inferred.

6.3.6 In the paragraphs 30 to 32, the plaintiff pleads that the instalment agreement with respect to the LHD 60 constitutes a credit agreement in terms of the National Credit Act, i.e., the NCA claim. It pleads further that the defendant is not registered under section 40 of the National Credit Act, and, therefore, the instalment agreement is unlawful and void ab initio.

6.3.7 The plaintiff does not plead that:

6.3.7.1 The defendant was required to register as a credit provider in terms of section 40(1) and (2) of the National Credit Act. Instead, the plaintiff pleads only that the defendant was not, and is not registered as a credit provider in terms of section 40 of the National Credit Act;

6.3.7.2 The National Credit Act applies to the agreement in terms of the provisions of section 4 and the agreement is not excepted from the application of the National Credit Act under section 4(1) and (2) of the Act.

6.3.7.3 In the premises, the plaintiff's particulars of claim fail to disclose a cause of action against the defendant

6.4 FOURTH GROUND

6.4.1 In the paragraph 22 of the particulars of claim, the plaintiff pleads that the defendant terminated the main agreement, by addressing the letter attached as annexure "ZB6" to the particulars of claim.

6.4.2 Annexure" ZB6" is therefore part of the plaintiff's cause of action under its claims 1 to 3.

6.4.3 In paragraphs 35 to 38, the plaintiff pleads that by retaining possession of the LHD 60, the defendant was unjustifiably enriched.

6.4.4 Paragraph 4 of annexure" ZB6" records that *"Currently there is an outstanding amount of R1,805, 142.84(one million, eight hundred and five thousand, one hundred and forty-two rand and eighty-four Cents) on the LHD. The final payment of the loan or the purchase of the LHD by DCM will be negotiated between yourselves and DCM.' [Underlining added].*

6.4.5 What the plaintiff pleads in paragraphs 35 to 38 of the particulars of claim contradicts what it pleads with reference to annexure "ZB6".

6.4.6 In the premises, the plaintiff's particulars of claim

6.5 FIFTH GROUND

In paragraph 16.6 of the particulars of claim, the plaintiff pleads that the defendants would at its cost provide the plaintiff with two load, haul and dump machines(LHD), which the plaintiff would utilise to provide the services required in terms of the main agreement, as amended.

6.5.1 In paragraph 16.11 of the particulars of claim, the plaintiff pleads

that a further term of the agreement was that the defendant would not remove any Site services from Scope of site Services, including any services or facilities required by the plaintiff for the rendering of its services, so as to ensure that the plaintiff was able to meet its target of 10 000 tons of chrome per month.

6.5.2 In the paragraphs 44 to 46 of the particulars of claim (under the heading "Claim 3"), the plaintiff claims damages in the sum of R5 38 225.61, being the alleged value of the shortfall below its 10 000 tons of chrome per month, allegedly suffered because the plaintiff remained without the use of LHD 44 until the alleged premature termination of the agreement on 28 February 2021.

6.5.3 Nowhere in the particulars of claim does the plaintiff plead that it was a term of the agreement:

6.5.3.1 That the use of the LHD 44 constituted Site Services as per the agreement; and

6.5.3.2 The renewal of the LHD 44 breached a pleaded term of the agreement and resulted in a damages claim envisaged in the agreement.

6.5.4 In the premises, the plaintiff's amended particulars of claim fail to disclose a cause of action against the defendant.

6.6 SIXTH GROUND

6.6.1 In paragraph 45 of the particulars of claim, the plaintiff pleads that as a result of the defendant having removed the LHD 44: -*"the Plaintiff suffered* a *decrease on production by only being able to work with one LHD. The Plaintiff, in being unable to meet its monthly target of 10* 000 *tons and chrome fines, suffered damages in the sum of R5 038 225.61, being the shortfall in the value of production ..."*

6.6.2 In claiming the total amount of R5 038 225.61, the plaintiff fails to account for saves costs as a result of inter alia not being able to meet its alleged monthly target of 10 000 tons, alternatively, fails to plead that the R5 038 225.61 claimed is a loss of profits after all the expenses have been deducted.

6.6.3 In the premises, the plaintiff's amended particulars of claim fail to disclose a cause of action against the defendant.

6.7 SEVENTH GROUND

6.7.1 Similarly, in paragraphs 27 to 29 of the amended particulars of claim, under the heading "Claim 1", the plaintiff pleads that it suffered damaged in the amount of R22 437 765.00 as a result of the defendant's "premature termination" of the main agreement. The amount is calculated on the basis of the 9 months *"being the remaining months of the contract, during which the Plaintiff would have met its target of 10* 000 *tons of chrome fines per month".*

6.7.2 In claiming the total amount of R22 437 765.00, the plaintiff fails to account for saved costs as a result of inter alia not being able to meet its alleged monthly target of 10 000 tons, alternatively, fails to plead that R22 437 765.00 claimed is a loss of profits after all the expenses have been deducted.

6.7.3 In the premises, the plaintiff's particulars of claim fail to disclose a cause of action against the defendant.

The Applicant has requested that as a result of the above the exception should be upheld with costs of these proceedings.

[7] The Respondent opposes the exception and argues amongst

others that the exception is fundamentally flawed, unmeritorious for reasons which are detailed in its argument, used as a dilatory tool to avoid a determination of the totality of facts involved in the matter leading up to the unlawful termination of the contract by the defendant and that The exceptions are argumentative technical legal questions which cannot be determined by way of an exception without the need for evidence which can only be led at trial.

[8] Uniform Rule 23 provides as follows: (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 set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his 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 matter aforesaid, and may set such application down for hearing in terms of paragraph (f) of subrule (5) of rule (6), but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted. (3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated. (4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.

[9] The issue is does the Plaintiff's particulars disclose a cause of action for the relief sought.

[10] The Respondent argues on ground 1 that, whether the contract is against public policy or not is a value judgment and this require evidence to make a determination- *Beadica 231* CC *and Others v Trustees for the time being of the Oregon Trust and Others*[1]*.* On ground 2 argues that this exception is impermissible as exceptions cannot settle questions of interpretation-Murray *& Roberts Construction Ltd v FINAT Properties (Pty) Ltd.*[2] On ground 3 in respect of application of the National Credit Act, argues that the Applicant can plead. With regard to ground 4 Applicant can be able to plead on the two contract signed and/or terminated lawfully or not. With regard to ground 5, argues that there is no contradiction to warrant an exception on this point. On ground 6 Respondent argues that the main issue is whether it suffered damages and this can be pleaded to, all other things are secondary. Argues that as a result of the above technical grounds which the SCA cautioned against, that the whole grounds should be dismissed with costs.

[11] The approach to an exception that a pleading does not disclose a cause of action was reiterated by Marais JA in *Vermeulen v Goose Valley Investments (Pty) Ltd:* "It is trite law that an 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"[3]. "An exception sets out why the excipient says that the facts pleaded by a plaintiff are insufficient. Only if the facts pleaded by a plaintiff could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, can an exception succeed. Only those facts alleged in the pa1iiculars of claim and any other facts agreed to by the parties can be taken into account[4]".

[12] Both the parties referred to the dicta of the SCA in *Telematrix (Pty) Ltd*

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[1] [2020] ZACC 13 para 112.
[2] 1991ALL SA 382 (A0
[3] [2001] 3 ALL SA 350 (A)para 7. See also Vermeulen v Goose Valley Investment (Pty) Ltd 2001 (3) SA 986 (SCA) at 997.
[4] First National Bank of Southern Africa Ltd v Perry NO and Others [2001] 3 ALL SA 331 para 6.

v Advertising Standards Authority South Africa[5] where the court relied on *Davenport Corner Tea Room (Pty) Ltd v Joubert*[6] that" Exceptions should be dealt with sensibly. They provide a useful 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.

I find that the dicta in this case finds resonance with the matter before me. The dispute between the parties arises from written contractual obligations and or breach in summation. The Plaintiff's particulars mainly consist of the terms of the said contract which are not generally in dispute save for the issues relating to the payment/s. when each pleading is read in totality of the others, the Defendant would not find it difficult to answer to the terms of contract it was a party thereto. In *Jowell v Bramwell-Jones and* Others[7] Heher J referred to the following general principles insofar as exceptions are concerned: "A. Minor blemishes are irrelevant: pleadings must be read as a whole; no paragraph can be read in isolation. 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. Only facts need be pleaded; conclusions of law need not pleaded"

[13] And in *Cook v Gill*[8]*,* referred to with approval by the SCA in *McKenzie v Farmers' Co-Operative Meat Industries Ltd,* it was held that a cause of action is disclosed when the pleading contains: "Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be

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[5] 2006 (1) SA 461 (SCA) para 3.
[6] 1962 (2) SA 709 (D) 715H.
[7] 1998 (1) SA 836 at 902J-903B
[8] LR. 8. C. P.107.

proved."[9] Put another way, judgment could be granted if the averments in those particulars of claim were proved[10].

In my view the particulars of claim are capable to be adjudicated on and whatever complaint the Applicant complaints of, from the detailed complaints themselves it is clear that the Applicant can answer thereto. Why this court had to be burdened with these technicalities which are capable of being resolved during trial by evidence is concerning. More so that the Respondent has in response to the complaints raised then in terms of Rule 23, amended the particulars of claim as far as the facts are concerned.

[14] Rule 18(4)[11] provides that "every pleading shall **contain a clear and concise statement of the material facts** upon which the pleader relies for his claim, defense or answer to any pleading as the case may be, **with sufficient particularity to enable the opposite party to reply thereto".** I find that the Respondent has complied with this in its particulars.

[15] It is trite that a court should endeavor to look benevolently instead of over- critically at a pleading, and it must be looked at as a whole. If there is any uncertainty in regard to a pleader's intention an excipient cannot avail himself thereof unless he shows that upon any construction of the pleadings the claim is excipiable, in this regard see: *Amalgamated Footwear & Leather Industries Jordan & Co Ltd.*[12]

[16] In *Southernpoort Developments (Pty) Ltd v Transnet L* TD[13] the court formulated the test on exceptions as follows:

> *"1. In order for* an *exception to succeed, the excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it.*

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[9] 1922 AD at 23.
[10] Jugwanth v MTN (Case no 529/2020) [2021] ZASCA 114 (9 September 2021)
[11] Uniforms Rules of Court
[12] 1948 (2) SA 891 (C) at 893
[13] 2003(5) SA 665 (W)

2. *A charitable test is used on exception, especially in deciding whether* a *cause of action is established, and the pleader is entitled to* a *benevolent interpretation.*

3. The Court should not look at a *pleading 'with* a *magnifying glass of too high power'.*

4. The pleadings must be read as a *whole; no paragraph can be read in isolation.*

In order to succeed with an exception, the excipient needs to satisfy the court that it would be seriously prejudiced in the event that the exception should not be upheld."

[17] Based on the discussion herein above, I am not persuaded that the particulars of claim do not raise a cause of action in which the Applicant can answer. The grounds taken on exception are technical in nature and subject to interpretation to a great extent. There is nowhere in the application where the Applicant addresses the prejudice if any it would suffer, let alone the seriousness thereof should the exception not be upheld. Therefore, the exceptions stand to fall. Even if the Applicant thinks I am wrong in my finding, I believe this does not close the door to any complaint raised should the Applicant still elects to pursue same. Same can be raised during the trial proceedings within the provisions of this court's rules.

[18] Applicant prayed that the exception be upheld and the Respondent be granted days leave to amend its particulars with costs. Whereas the Respondent prayed for the dismissal of the exception with costs.

[19] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the

successful party or other exceptional circumstances. See *Myers v Abramson.*[14] I have no finding of misconduct in the matter before me.

[20] In the result the following order is made:

20.1. The exception is dismissed.

20.2 The Applicant/Defendant is to pay the costs of suit, including for two counsels where applicable.

R.P MDHLULI
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

[14] 1959 (3) SA 438 (C) at 455.

APPEARANCES

Heard on:	30 January 2023
Judgment circulated on:	24 March 2023
For the Defendant/ Excipient:	Adv N.H Maenetje SC
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