

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(MPUMALANGA DIVISION, MBOMBELA)

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

A handwritten signature in black ink, appearing to be "M. Mashile", written over a light blue rectangular background.

07/01/2021

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SIGNATURE

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DATE

**CASE NO: 1941/2018**

In the matter between:

**UNIVERSITY OF MPUMALANGA**

Excipient

and

**MAGMA MASEMOLA ATTORNEYS INC**

Respondent

*In Re:*

**MAGMA MASEMOLA ATTORNEYS INC**

Plaintiff

and

**UNIVERSITY OF MPUMALANGA**

Defendant

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**J U D G M E N T**

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**MASHILE J:**

- [1] For purposes of avoiding possible confusion, I shall refer to the parties as the Plaintiff and Defendant and not as they are cited in the exception – Excipient and Respondent. This matter commenced as a motion court case. In the process certain disputes of fact arose requiring it to be referred to trial for oral evidence. Below I describe a terse factual background that led to the current proceedings.
- [2] The Plaintiff launched motion proceedings against the Defendant on 16 July 2018 having founded his claim on the Defendant's acknowledgment of debt recorded in correspondence exchanged between the parties. Confronted with this claim, the Defendant gave notice of his intention to oppose, which notice has no date of service and filing. Believing that the particulars of claim were objectionable in several respects, the Defendant gave a notice in terms of Rule 23 (1) dated 05 May 2020, demanding the removal of the cause of complaint failing which the Defendant would proceed to set down the exception.
- [3] When the Plaintiff failed to amend its particulars of claim, the Defendant perfected its threat by filing and setting down the exception. The attack at the particulars of claim is that they are either vague and embarrassing or do not disclose a cause of action or both. The complaints have been formulated as follows:

*“TAKE NOTICE THAT the Defendant hereby excepts to the Plaintiff's amended particulars of claim on the grounds that they are vague and embarrassing and/or alternatively do not disclose a cause of action in the following respects:*

- 1. In paragraph 3 thereof, the Plaintiff merely avers that when it concluded the written agreement, the Defendant was duly represented by its Registrar, Sello Legodi (alternatively a duly authorised representative).*
- 2. In this regard, Plaintiff does not aver whether and by whom was Sello Legodi was authorised.*
- 3. Furthermore, Plaintiff does not aver who the “duly authorised representative” of the Defendant was.*

4.

4.1            *The Defendant is an organ of state and as such is obliged by the provisions of section 217 of the Constitution of the Republic of South Africa to procure goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*

4.2            *The Plaintiff's particulars of claim do not aver that the services that were allegedly sought from it were sought in accordance with the system set out in section 217 of the Constitution."*

- [4]    The onus that a pleading is vague and embarrassing or that it discloses no cause of action rests on a Defendant. To demonstrate this, it must show that in all its possible meanings, the pleadings as they stand are so vague and embarrassing that they are meaningless and/or that no cause of action is disclosed<sup>1</sup>.
- [5]    An exception that a pleading is vague and embarrassing cannot be directed at a particular paragraph within a cause of action. The exception must go to the whole cause of action, which must be demonstrated to be vague and embarrassing. It must be such that it is so "vague and embarrassing to the extent that the Defendant does not know the claim he has to meet"<sup>2</sup>.
- [6]    Where an exception is taken a court looks only to the pleading excepted to as it stands, not to facts outside those stated in it<sup>3</sup>. As such, the excipient must satisfy the court that it would be seriously prejudiced if the offending pleading were allowed to stand<sup>4</sup>.

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<sup>1</sup> **Liquidators Wapejo Shipping Co Ltd v Lurie Bros 1924 AD 69 at 74 and Trope v South African Reserve Bank 1993 (3) SA 264 (A) at 268F.**

<sup>2</sup> See, **Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W)**, at 899G. "...where a statement is vague, it is either meaningless, or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on, and therefore it is also something which is insufficient in law to support in whole or in part the action or defence". See, **Leathern v Tredoux 1911 NPD 346 at 348.**

<sup>3</sup> **Baliso v Firststrand Bank Ltd t/a Wesbank 2017 (1) SA 292 (CC)**, at para [33].

<sup>4</sup> **Francis v Sharp and Others 2004 (3) SA 230 (C)**

[7] The general purpose behind rule 18 is to define issues so as to allow the other party to know what case it is he has to meet. The pleadings must be set out in such a way that enables the other party to know what the issues are. The level of particularity of a pleading will depend on the facts and circumstances of each case. Where a party's pleadings fail to comply with the provisions of rule 18 and are vague and embarrassing, the other party can elect to raise an exception in terms of rule 23(1) and is not obliged to invoke rule 30, which deals with irregular steps<sup>5</sup>

[8] Rule 18(4) and (6) respectively read as follows:

*“(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”*

*“(6) 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.”*

[9] Rule 18(6) is specific to causes of action founded on contract and is in addition to the more general injunction in rule 18(4) to include sufficient particularity. It thus specifies the minimum requirement for particulars of claim relying on contract. A party unable to attach a written contract to the particulars because it is not in possession thereof should say so, so that the defendant knows that secondary evidence will be led at the trial in order to prove the contract. Non-compliance with the requirements of rule 18(6) may be condoned if there is no prejudice to the defendant<sup>6</sup>.

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<sup>5</sup> **Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 at 198; Imprefred (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 107C-E and Nasionale Aartappel Kooperasie BPK v Price Waterhouse Coopers Ing 2001 (2) SA 790 T at 798F – 799J.**

<sup>6</sup> **Duss And Others NNO v Lowewest Trading (Pty) Ltd 2011 (1) SA 48 (KZD) at paragraph 16.**

## **FIRST COMPLAINT**

- [10] The concern here is that the Plaintiff avers in its particulars of claim that at the time of the conclusion of the agreement with the Defendant it was represented by Mr Magale Zebulon Masemola, while the Defendant was represented by its Registrar, Mr Sello Legodi, alternatively, a duly authorised representative. The Defendant complains that the Plaintiff has omitted to state who authorised Mr Sello Legodi to represent the Defendant. Furthermore, the Plaintiff does not specify who the other representative pleaded in the alternative is nor does it mention who authorised that representative.
- [11] The Defendant referred this Court to Rules 22(2) and 22(3) of the Uniform Rules of Court. Rule 22(2) provides that a defendant shall in the plea either admit or deny or confess and avoid all the material alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies. Moreover, concludes the Defendant, Rule 22(3) states that every allegation of fact in the combined summons or declaration which is neither denied nor admitted shall be deemed to be admitted.
- [12] The Defendant submits that it does not know how to plead to the allegations pertaining to Sello Legodi and the unknown representative pleaded in the alternative. As such, it alleges that it is embarrassed to plead thereto. The vagueness in this instance leads to embarrassment, which in turn causes prejudice.
- [13] Conversely, the Plaintiff contends that the Defendant has targeted a particular paragraph within the Plaintiff's cause of action – admission of liability by the Defendant. The Court should not countenance this for as long as the vagueness and embarrassment do not strike at the core of the cause of action. To the extent that the Defendant does not object to the manner in which the cause of action has been formulated at all, the complaint ought to be dismissed as bereft of any merit.

[14] From the perusal of the exception it is manifest that the impugned paragraph of the particulars of claim does not contain the cause of action. The cause of action is the admission of liability of the amount due by the Defendant stated in paragraph 10.1 of the particulars of claim. The Defendant's allegation that it is embarrassed to plead to this averment leaves this Court confounded. A denial of each and every allegation contained in that paragraph as if specifically traversed should suffice.

[15] In that manner the Defendant will not run the risk of leaving out some other allegation, which it may be inferred was not challenged and therefore admitted as contemplated in Rule 22(3). It must also be borne in mind that Rule 21(2) dealing with request for further particulars is also available to the Defendant where it feels that the information is strictly required for purposes of trial. The rule provides that:

*"After the close of pleadings any party may, not less than twenty days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial. Such request shall be complied with within ten days after receipt thereof."*

[16] The argument that the Defendant cannot wait until the closure of pleadings and then proceed to request further particulars for trial because it is required to plead now is disingenuous as demonstrated above. The truth is the Defendant can overcome that hurdle, if it ever was, and then request further particulars as per the provisions of Rule 21(2). In the circumstances, I can perceive no prejudice caused to the Defendant. The first complaint cannot be upheld because the attack is not directed at the whole cause of action and besides, it can plead and embark on the procedure prescribed in Rule 21(2).

[17] For what it is worth, I need to point out that it is not correct that the Defendant has by choosing to come to this Court utilizing an exception 'saddled the wrong horse'. As can be seen from the case authority cited above, in particular Robinson, where a pleading does not comply with the provisions of Rule 18

rendering it vague and embarrassing, a Defendant does not have to approach Court by way of a Rule 30 notice, which deals with irregular steps but can choose to utilize Rule 23(1), as the Defendant did here.

## **SECOND COMPLAINT**

- [18] The complaint here is founded on Section 217 of the Constitution of the Republic of South Africa the essence of which is that as an organ of State the Plaintiff is bound by the provisions of the Section to procure goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The Defendant asserts that to the extent that the Plaintiff does not aver in its particulars of claim that the services that were allegedly sought from it were sought in accordance with the system set out in section 217 of the Constitution, the particulars of claim do not disclose a cause of action.
- [19] The complaint in this regard generated a debate on whether the Plaintiff is an Organ of State. The Plaintiff argued that nowhere in the different pieces of legislation is the Plaintiff regarded or defined as an Organ of State. On the other hand, the Defendant started from the premise that it was common cause between the parties that the Plaintiff is an organ of State. I do not think that it is necessary for this Court to enter that debate at all to decide whether or not the particulars of claim are excipiable.
- [20] The factual basis upon which the Plaintiff's claim is built are described in the particulars of claim. Nowhere in the particulars of claim does the Plaintiff intimate that its cause of action is based on Section 217 of the Constitution. Where a Defendant wishes to attack a pleading on the ground that it does not disclose a cause of action, it should be a matter of course that the exception ought to bear relevance to that cause of action described in the particulars of claim. This is not the case in *casu*.
- [21] The particulars of claim do disclose a cause of action albeit not one that the Defendant thinks should have been. I find it gratuitous to traverse the parties'

argument on whether the Plaintiff is an Organ of State or not. That debate was totally unwarranted in view of the cause of action set out in the particulars of claim –admission of liability. Against that background, I am constrained not to uphold the exception in respect of the second complaint.

[22] I make the following order:

1. The exception is dismissed with costs including those consequent upon the employment of two Counsel.
2. The Defendant is directed to deliver its plea within the period prescribed in the Uniform Rules of Court from date of this order.



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**B A MASHILE**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
MPUMALANGA DIVISION, MBOMBELA**

*This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 7 January 2021.*

**APPEARANCES:**

**For the Plaintiff:**

Adv.S Tshikila

**Instructed by:**

DMS Attorneys

**For the Defendant:**

Adv.: V S Notshe SC

**Instructed by:**

Nkadimeng Attorneys

**Date of Hearing:**

08 October 2020

**Date of Judgment:**

07 January 2021