

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 17029/2020

In the matter between:

RICHARD JOHN HECTOR

Plaintiff

and

GEORGE MUNICIPALITY

First Defendant

GEORGE LINK (PTY) LTD

Second Defendant

JUDGMENT DELIVERED ELECTRONICALLY: TUESDAY, 13 JULY 2021

NZIWENI AJ

Introduction

[1] This is an opposed exception in terms of Rule 23(1) of the Uniform Rules of Court filed by the First Defendant against the Plaintiff's particulars of claim. Chiefly, the First Defendant complains that the said particulars lack averments which are necessary to sustain an action.

[2] The Defendant's notice of exception reads as follows:

"BE PLEASED TO TAKE NOTICE that . . .

COMPLAINT 1

8. Section 19 (1) (a) (iii) of the Supreme Court Act 59 of 1959 ("the Act") provides that, "in addition to any powers of jurisdiction which may be vested in it by law, a provincial or local division of the Supreme Court shall have power, in its discretion, and at the instance of an interested person, to enquire into and determine any existing, future or contingent right or obligation.

9. During the first stage of this enquiry, the court must be satisfied that the Plaintiff has an existing, future or contingent right or obligation. If the court is satisfied that the existence of such conditions have been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought.

10. In terms of Rule 17 of the Uniform Rules of the Court ("the rules") it must appear from the summons that the Plaintiff has interest in the matter which entitles him to sue. Rule 17 (2) requires the Plaintiff to allege the material facts relied upon by Plaintiff in support of his claim.

11. At paragraph 4 of the particulars of claim ("the claim"), the Plaintiff alleges that he was a shareholder of the Second Defendant.

12. At paragraph 5 of the claim, the Plaintiff alleges that his father and the second Defendant entered into a written agreement referred to as the Declaration agreement.

13. At paragraph 7 the Plaintiff alleges that, after his father's death, the Plaintiff succeeded his father as a party to the Declaration.

14. At paragraph 8 of the claim the Plaintiff alleges that in order to become shareholders he had to relinquish certain routes.

15. At paragraph 9 of the claim the Plaintiff alleges that the Plaintiff's father and the First and Second Defendant entered into written agreement called the compensation agreement. As before, the Plaintiff alleges that, after his father's death, the Plaintiff succeeded his father as a party to the compensation agreement.

16. At paragraphs 12 and 12.1 of the claim the Plaintiff alleges that all the parties undertook to do all things and to perform all acts as may be necessary for putting into effect the terms, conditions and import of the agreement.

17. At paragraph 12.3 of the claim the Plaintiff alleges that all the parties undertook to do all things and to perform all acts as may be necessary for putting into effect the terms, conditions and import of the agreement.

18. At prayer (b) the Plaintiff prays for declaratory relief that the First and Second Defendant do all things necessary to restore the Plaintiff's rights in terms of the Compensation agreement.

19. It is common cause that the Plaintiff is not a party to the declaration agreement and the compensation agreement.

20. There is no need for a court to exercise its power to make a declaratory order where the Plaintiff is not entitled to the relief. Furthermore, this Honourable Court cannot make a declaration of some-one else's rights.

21 Accordingly, in terms of pleaded facts and the parties to the respective agreements, there are no interested persons on whom the declarator is binding.

22. *Ex facie the agreements the Plaintiff has no enforceable rights hence the declaratory is incompetent. As such the Plaintiff lacks locus standi. The Plaintiff is not acting in any representative capacity of a deceased estate.*

23. *The Plaintiff's rights as heir to his late father's estate have not been pleaded, neither has pleaded that the provisions of the last will and testament of his late father is binding on the First Defendant.*

24. *The general rule is that it is for the party instituting proceedings to allege and prove it has locus standi and the onus of establishing it rests on that party.*

25. *The Plaintiff has failed to allege the material facts upon which he relies in order to be entitled to relief claimed.*

26. *Consequently, the Plaintiff's claim lacks essential averments necessary to sustain the cause of action.*

COMPLAINT 2

27. *The Plaintiff failed to plead facts to establish that he had any existing rights which are enforceable. The Plaintiff failed to rely on any provision in any agreement, or other, to specify precisely which right is implicated.*

28. *At paragraphs 7 and 11 of the claim, the Plaintiff alleges that he succeeded his father as a party to the declaration agreement and compensation agreement (collectively referred to as "the agreement") respectively.*

29. *As such the Plaintiff is required to allege all essential facts in order to establish the agreement to cede and cession itself. Furthermore, the Plaintiff must allege the facts to establish that at the time of death, his late father was entitled to the rights which he ceded to the Plaintiff.*

30. *The Plaintiff is required to allege and prove that this cession of his late father's rights to him is permissible in terms of the agreements and that the First Defendant consented to the cessation.*

31. *The Plaintiff has failed to allege the relevant facts to establish a valid cession.*

32. *This Honourable Court lacks inherent power to declare the existence of specified rights in the absence of clear facts to establish the existence of same.*

33. *Consequently, the Plaintiff's claim lacks essential averments necessary to sustain a cause of action.*

COMPLAINT 3

34. *In terms of rule 17 (2), the Plaintiff is required to allege the material facts relied upon in support of his claim.*

35. *The Plaintiff's claim is based on a written contract that was reduced to writing as provided for in terms of the declaration agreement and the compensation agreement.*

36. *Clause 1.1 of the declaration agreement provides that the operator agrees to relinquish certain of his route authorities pertaining to the licences detailed in Annexure A thereto in order to participate in the George Integrated Public Transport Network ("GIPTN").*

37. *Clause 2 of the declaration agreement provides that an exchange for certain authorities pertaining to licences listed in Annexure A thereto, the operator elects to buy-in/buy-out combination detailed in Annexure A.*

38. *Clause 3 of the declaration agreement provides that only operators who elect to buy-in in the GIPTN will be entitled to become shareholders.*

39. *Clause 1.1.6 of the compensation agreement defines the buy-in option as an election by an operator to relinquish its affected licence and adhere to restraint conditions associated therewith, for compensation and which also entitled the operator to become a shareholder.*

40. *Clause 2.1 of the compensation agreement provides that the operator agrees to relinquish its affected licence to cease operations affected routes and to adhere to the restraint conditions in exchange for compensation.*

41. *The compensation agreement provides for other obligations of the operator.*

42. *The Plaintiff failed to allege that he complied with these obligations in terms of the agreements in order to be entitled to become a shareholder and be entitled to compensation as a shareholder.*

43. *The Plaintiff, in terms of the declaratory relief is claiming for specific performance of a contract that demands reciprocal performance. As such the Plaintiff must allege or tender performance of his obligations.*

44. *The Plaintiff has failed to allege and/ or tender reciprocal performance.*

45. *Accordingly, the Plaintiff claim lacks essential averments to sustain a cause of action.*

The Plaintiff has failed to allege and/ or tender reciprocal performance.

COMPLAINT 4

46. *Paragraph 15 of the claim provides that the purported cancellation by the First Defendant constituted a repudiation of the agreement which repudiation the Plaintiff did not accept.*

47. *The relief claimed in terms of the declaratory order is based on restitution and specific performance of accrued rights.*

48. *In order to rely on a repudiation, the Plaintiff is required to allege all the material facts to establish repudiation on the part of the First Defendant.*

49. *The Plaintiff has failed to allege all the material facts required to establish a repudiation.*

50. *Consequently, the claim lacks averments necessary to sustain a cause of action.*

In order to rely on a repudiation, the Plaintiff is required to allege all the material facts to establish repudiation on the part of the First Defendant.

COMPLAINT 5

51. *On 12 February 2021, in a reply to the First Defendant's correspondence to remove the causes of complainants relating to the pleadings, the Plaintiff's attorney stated the provisions regarding a breach, on the part of the First Defendant, are provided for in paragraphs 13-15 of the claim.*

52. *Paragraph 13 of the claim provides that the First Defendant purported to cancel the compensation agreement pursuant to the Plaintiff's alleged failure to relinquish his existing licences by that stage.*

53. *Paragraph 14 of the claim provides that the Plaintiff did not have to relinquish his licence by that stage as the First Defendant made full performance on its part impossible. The Plaintiff alleged three grounds upon which the First Defendant made full performance impossible.*

54. *None of the grounds referred to in paragraph 14 relate to any obligations of the First Defendant in terms of the Declaration agreement or the Compensation agreement.*

55. *The Plaintiff does not allege that the First Defendant breached a contractual duty owed to him, or that the First Defendant wrongfully breached a contractual term.*

56. *The Plaintiff did not allege that the grounds referred to in paragraph 14 of the claim were contractual terms nor did he allege the basis for which those grounds alleged were owed to him. There is no allegation that when the First Defendant cancelled the compensation agreement that it acted contrary to the terms of any contract between them.*

57. As such the Plaintiff failed to establish a breach a breach on the part of the First Defendant, in terms of which he was entitled to refuse to relinquish his operating licence.

58. Based on the pleadings, the cancellation of the agreement for breach of a material term of the compensation agreement, being the failure to relinquish the operating licence, fell within the power of the Defendant. This Court has no power to declare a contract valid which has been validly terminated.

COMPLAINT 6

59. Clause 7 of the compensation agreements provided the circumstances under which the agreement could be terminated.

60. Clause 7.3 of the compensation agreement provides that, “should either party to the agreement breach any of its obligations in terms of this agreement and remain in breach thereof after the expiry of a period of 14 days” notice in writing given to the party in breach by the affected party calling upon the party in breach to remedy such breach, the affected party shall have the right, without prejudice, to any other rights to which he may be entitled in law, or under this agreement.

61. In the event that the Plaintiff is successful in proving a breach on the part of the First Defendant, the Plaintiff has failed to allege facts to establish compliance with the provisions of clause 7.3 of the compensation agreement.

62. As such, the Plaintiff is not entitled, in terms of clause 7.3.15 to hold the First Defendant bound to the agreement and enforce performance of its obligations.

63. The plaintiff has failed to establish facts to establish demand and has failed to plead demand and a failure to perform in terms of the demand, on the part of the First Defendant.

64. In addition, the Plaintiff has failed to attach any written notice advising the First Defendant to remedy the alleged breach, as well as a letter of demand for performance in terms of the First Defendant’s obligations in terms of the Declaration agreement and/ or the Compensation agreement.

65. In terms of clause 7.3 the demand is material before the Plaintiff is entitled to any remedies provided for in the remainder of the clause.

66. A declarator is not competent where other relief is claimable, including damages arising out of the breach of the agreement.

67. Consequently, the pleadings lack essential averments necessary to sustain a cause of action.

NOW THEREFORE

68. *Having regard to complaints 1-6, the claim falls to set out legal grounds upon which the Plaintiff can claim relief in terms of prayers (a) to (g) of the claim.*

69. *In the circumstances, the First Defendant submits that the Plaintiff's claim lacks essential averments necessary to sustain a cause of action. The Plaintiff's claim does not disclose a cause of action against the First Defendant. The first Defendant is unable to plead to the particulars of claim and same are excipiable."*

Evaluation

Complaints 1 and 2

[3] A pleading plays an important role in identifying the issues between parties, because the opposite party should be capable to ascertain what case it is required to meet. Otherwise, the opposite party will be put in an unfavourable position during trial. Hence the importance of lucid and logical pleading is completely undeniable.

[4] The first complaint pertains to *locus standi*. The second complaint relates to the purported failure by the Plaintiff to allege necessary averments to prove that he succeeded his father as a party to the Declaration and Compensation agreement or necessary averments to sustain a cause of action. The Counsel for the first Defendant submitted that the Plaintiff did not plead the provisions of his father's last will and testament.

[5] In the first complaint, the First Defendant is complaining that the particulars of claim do not reveal on what basis the Plaintiff has *locus standi*. In other words, the Plaintiff's averments in the particulars of claim do not disclose sufficiently that he has a direct interest in the matter.

[6] It is trite that a Plaintiff must allege and prove *locus standi*. See *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (AD) at 575 H. In the particulars of claim, it is pleaded that the Plaintiff succeeded his father as a party to the Declaration and Compensation agreement after his father's death. Consequently, the Plaintiff is bringing the action not on behalf of anyone but as a direct action in his own right.

[7] It has been held that a defect in the pleading must appear *ex facie*. See *Barnard v Barnard* 2000 (3) SA 741 (CPD) at para 10.

[8] On the one hand, the First Defendant argues that what is pleaded in the particulars of claim does not clothe the Plaintiff with the necessary *locus standi*. It is further contended on behalf of the First Defendant that in terms of the pleaded facts, the Plaintiff has no enforceable rights as his late father was the actual party to the Declaration and Compensation agreements. So the argument continues that the Plaintiff failed to plead the facts to establish how, when and why the said right accrued to him. It is further strongly contended on behalf of the First Defendant that: *"The Plaintiff alleges that he succeeded his father as a party to the Declaration agreement after his father's death. The Plaintiff's rights as heir to his late father's estate have not been pleaded, neither has the Plaintiff pleaded that the provisions of the last will and testament, if at all, of his late father is binding on the First Defendant."*

[9] On the other hand, it was argued on behalf of the Plaintiff that the Plaintiff, only needs to plead the *facta probanda*.

[10] It is significant to note that the perusal of the Declaration and Compensation Agreements reveals that under clause 12: *"an operator can cede, assign, delegate, or transfer his or her rights and obligations as part of distribution of the operator's estate"*.

[11] In *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23 *"...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 proved."*

In *Evans v Shield Insurance Co Ltd* 1980 [2] SA 814 (A) at 825G dealing with the 'cause of action', the following was stated: *"... is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action."*

In *Jowell v Bramwell-Jones and Others* 1998 [1] SA 836 (W), the court stated that:

"Minor blemishes are irrelevant: pleadings must be read as a whole; no paragraph can be read in isolation... A distinction must be drawn between facta probanda or primary factual allegations which every plaintiff must make, and the facta probantia, which are secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter matters for particulars for trial and even then are limited. (my emphasis) For the rest, they are matters of evidence. Only facts need be pleaded; conclusions of law need not be pleaded".

[12] In paragraphs 7 and 11 of the particulars of claim, the Plaintiff avers that he succeeded his father as a party to the Declaration and Compensation Agreements after his father's death. Put differently, he alleges that he is the legal heir to succeed his father in the Declaratory and Compensatory Agreements.

[13] The Plaintiff did provide particulars in respect of which he claims *locus standi*. It is my view that from the facts particularised by the Plaintiff in the particulars of claims; it is fairly ascertainable from the pleading that the Defendants have been sufficiently apprised why the Plaintiff is claiming *locus standi*.

[14] Even the complaints mentioned on behalf of the First Defendant evinces that the First Defendant understands the particulars of claim when it comes to the *locus standi*. I say this because it is asserted that the Plaintiff did not plead the terms of the will even though the Plaintiff did not mention a will in the particulars of claim. Plainly, the First Defendant by mentioning the will anticipates what evidence is going to be led in the trial. This, in my mind, demonstrates eloquently that the First Defendant knows what case it will need to meet and will not be taken by surprise, during the trial. This is so because the Plaintiff has defined in general terms the material facts upon which he relies on, to claim *locus standi*.

[15] It is my view that the First Defendant is currently seeking needless prolix narrative of the facts. This is all the more unnecessary as this court at this juncture, is not tasked with determining whether the Plaintiff has *locus standi*. But it is tasked with determining whether sufficient averments have been made to allege *locus standi*. The facts which the First Defendant requires with reference to *locus standi*,

are relevant to proof. Clearly, it is not that the particulars of claim should contain evidence upon which the material facts are to be proved.

[16] It is critical to draw a distinction between essential averments of the case from the evidence by which they are proved. Inasmuch as the Plaintiff is required to prove his *locus standi*, he however, cannot do so in the pleadings as they are not a forum to prove allegations. It is a settled principle of our law that *facta probantia* has no place in pleadings. In this matter, on the facts alleged, it would be incorrect to assert that the Plaintiff did not plead *locus standi*. In any event, the nature of this matter does require that the Plaintiff should plead what is complained about in the first complaint.

[17] Though I suspect that in the trial, the Plaintiff will need to refer to the terms and consequence of the last will and testament of his father to prove or support his claim on the pleading, for the current purpose of pleading however, the Plaintiff is not required to prove his averments, as he has pleaded the necessary facts relied upon to establish *locus standi*. For that matter, the last will and testament of the Plaintiff's father is attached to the particulars of claim. Consequently, when the Plaintiff leads such evidence in the trial it will not mean that he is departing from his pleading.

[18] It has also been held that pleadings are not supposed to be a preview of the evidence that is going to be lead at the trial. In *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C)* Potgieter AJ opined the following at para 14:

"Generally the information in a declaration or particulars of claim need only be sufficient for the defendant to plead thereto. The exception stage is not the time for the defendant to complain that he does not have enough information to prepare for trial or may be taken by surprise at the trial. That comes later in the (often long and cumbersome) journey to the doors of the court, after, inter alia, discovery of documents and requests for trial particulars had been made."

[19] As evinced in the case of *Jowell*, supra, that it is settled that the pleading must be read as a whole and one paragraph should not be read in isolation of the others. However, merely from gleaning at the above averment it becomes immediately

evident that, the Plaintiff is not simply a busy body or someone who is meddling in business, which does not concern him but someone who derived his authority and the necessary *locus standi* by virtue of his father's death. Furthermore, it is also evident from the particulars of claim that the Plaintiff also relies upon the agreements, which were entered between his father and the First Defendant.

[20] In so far as the cession is concerned, the Plaintiff never alleged that he obtained his rights from a cession. Clearly when it comes to this aspect, counsel on behalf of the First Defendant is drawing conclusions, which are not supported or justified by the alleged facts in the particulars of claim. It is an established principle of our law that an excipient is confined to the facts alleged in the particulars of claim as it stands and cannot at the exception stage go beyond the record.

[21] For that matter, clause 12 of the Declaration and Compensation Agreement is clearly headed '*Transfer, Cession and Assignment*'. If regard is given to clause 12 of the Declaration and Compensation Agreement it becomes plain that rights and obligations can be given to a third party in various ways other than the cession.

Complaint 3, 4 5 and 6

[22] In *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at para 10 it was stated that:

"The test on exception is whether on all possible readings of the facts no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts."

[23] No extraneous facts may be adduced to show that the pleading is excipiable, the defect in the pleading must appear *ex facie*.

[24] In this matter, the First Defendant does not allege that the exceptions ought to be upheld because on every reading which the pleading in question, and particularly the agreements on which it is based, disclose no cause of action.

[25] On numerous occasions our courts have sounded a warning that courts should be reluctant to decide on exception issues involving interpretation of a contract. See, *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (SCA).

[26] The following is stated under complaint 3 of the Notice of exception:

“42. The plaintiff failed to allege that he complied these obligations in term of the agreements in order to be entitled to become a shareholder and be entitled to compensation as a shareholder.

43. The Plaintiff, in terms of declaratory relief is claiming for specific performance of a contract that demands reciprocal performance. As such the Plaintiff must allege or tender performance of his obligations.

44. The Plaintiff has failed to allege and /or tender reciprocal performance.”

[27] First and foremost, the Plaintiff after setting out in the particulars of claim the terms of the relevant agreements he categorically alleged in his particulars of claim that the First Defendant made full performance on his part impossible.

[28] An exception hearing is not meant to be dress rehearsal of the trial. The First Defendant in complaint 3 essentially requires of this court to interpret the agreements involved in this matter.

[29] In complaint 4 the following is alleged:

“In order to rely on repudiation, the Plaintiff is required to allege all material facts to establish a repudiation on the part of the Defendant.”

[30] If regard is had to all the averments contained in paragraphs 13 to 15 of the particulars of claim, it is evident that the repudiation is based on the allegations contained in those paragraphs. Clearly, the Plaintiff relies on all of the conduct referred to those paragraphs.

[31] When it comes to complaint 5, the following is stated in paragraph 54 of the Notice of exception:

“None of the grounds referred in paragraph 14 relate to any obligations of the First Defendant in terms of the Declaration agreement or Compensation agreement.”

Once again, when it comes to this particular issue raised by the First Defendant, this specific exception is based upon an interpretation of the relevant agreements and conclusions reached by the First Defendant. Evidently, once again the First

Defendant wants this court to interpret the terms of the agreements at this juncture. As already alluded herein above is an issue for trial court and it has absolutely nothing to do with an exception. Whether the case of the Plaintiff has merit or not is not for this court to determine.

[32] Similarly paragraphs 55-56 of the Notice of exception and complaint 6 are not relevant for purposes of an exception hearing. As far as I can glean from the papers and the submissions made on behalf of the First Defendant, they evince that the case of the Plaintiff is actually pleaded to the extent that the First Defendant is reasonably informed about the Plaintiff's case and as to what the First Defendant is in for. It is my firm view that, on any or every reading of the particulars of claim as pleaded, that the particulars of claim, meet the requisite precision.

Conclusion

[33] It's not the purpose of exception proceedings to ascertain or detect whether in the trial, the litigant with the impugned pleadings is guaranteed success. The court seized with the exception proceedings needs to find as to whether the pleadings pass the muster under Uniform Rules 23 and 18.

[34] It follows from this that all the exceptions raised are accordingly without merit. In the result, I make the following order:

- (a) The exceptions are dismissed.
- (b) The First Defendant is ordered to pay the Plaintiff's costs, such costs to include the costs of counsel.

CN NZIWENI

Acting Judge of the High Court

Appearances

Counsel for the Plaintiff : Adv M Daling
Counsel for the Defendants : Adv Y Isaacs