

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 28739/2021

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

12 September 2022

.....

Date

.....

ML TWALA

In the matter between:

ALTCOIN TRADER (PTY) LTD
EXCIPIENT/DEFENDANT

(Registration Number: 2015/418624/07)

And

NEIL
RESPONDENT/PLAINTIFF
(Identity Number:[...])

JOHN

BASEL

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 12th of September 2022

TWALA J

- [1] The excipient in this case brought this application in terms of rule 23 of the Uniform Rules of Court wherein it excepts to the plaintiff's particulars of claim to the summons on the grounds that the particulars of claim do not disclose a cause of action.
- [2] The facts which are foundational to this case are that the excipient, who conducts business as an online cryptocurrency trading platform, entered into a written agreement premised on its terms and conditions with the respondent during or about 2017. It was a term of the agreement that the excipient reserves the right to amend the terms and conditions of the agreement at any time and in fact certain amendments to the terms and conditions of the agreement were effected in March 2019. As a result of the

agreement the respondent was allowed to be a user of the excipient's platform and traded, i.e. he bought and or sold and or stored cryptocurrencies on the excipient's platform.

[3] On the 11th of May 2019 an unknown person or perpetrator gained access to the respondent's profile on the excipient's platform. The unknown perpetrator bought and sold the cryptocurrencies of the excipient in an irregular, unusual and atypical manner which was completely different from the known respondent's trading patterns in that he/she bought cryptocurrencies at a higher value and sold same at a significantly lower value. At the time the respondent had stored his cryptocurrencies on the excipient's platform. The excipient excepts to the respondent's particulars of claim that it does not disclose a cause of action since it contends that it has been excluded from liability for losses that may be suffered by a user when trading on its platform in terms of the agreement.

[4] It is trite that an exception that a pleading does not disclose a cause of action strikes at the formulation of the cause of action and its legal validity. The complaint is not directed at a particular paragraph in the pleading but at the pleading as a whole, which must be demonstrated to be lacking the necessary averments to sustain a cause of action. Furthermore, it is trite that exceptions should be dealt with sensibly since they provide a useful mechanism to weed out cases without legal merit. However, an overly technical approach should be avoided because it destroys the usefulness of the exception procedure. (*See Telematrix (Pty) Limited v Advertising Standards Authority SA 2006 1 ALL SA 6 (SCA); 2006 1 SA 461 (SCA)*).

- [5] In *M Ramanna and Associates cc v The Ekurhuleni Development Company (Pty) Ltd*, case No: 25832/2013 (4 April 2014) ZAGPJHC this Court stated the following:

“It is a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the abolition of the requests for further particulars of pleading and the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; and the cause of action or defence must appear clearly from the factual allegations made.

The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed and this fundamental principle can only be achieved when each party states his case with precision”.

- [6] In the recent past, the Supreme Court of Appeal per Ponnann JA in *Luke M Tembani and Others v President of the Republic of South Africa and Another* (Case no 167/2021) [2022] ZASCA 70 (20 May 2022) referring to the authorities quoted above stated the following:

“Paragraph 14: Whilst exceptions provide a useful mechanism to weed out cases without legal merit, it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that exception is competent. The

burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out; it being 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.”

[7] Before proceeding with the discussion, it is useful to restate the causes of complaint of the excipient which are the subject of this exception and which are as follows:

“Ground 1

- 1. In paragraph 5 and 7 of the plaintiff’s particulars of claim the respondent relies on the fact that it concluded a written agreement with the excipient on the terms and conditions as set in annexures “POC1” and allegedly changed as per “POC2” to the respondent’s particulars of claim.*
- 2. In paragraph 11 of the respondent’s particulars of claim, he pleads that he complied with all his obligations in terms of the agreement with the excipient.*
- 3. In terms of the provisions of both annexures “POC1” and “POC2” of the agreement as concluded and relied on by the respondent, (which regulates the relationship between the excipient and respondent) it expressly provides that:
“Trading by means of buying or selling Crypto Coins cannot be reversed! AltCoin Trader will not be liable for any losses whatsoever resulting in trading on our site”.*

4. *By reason of the aforesaid the respondent indemnified the excipient against any liability for any loss whatsoever resulting in trading on the excipient's site/platform.*
5. *In the circumstances, the respondent has failed to make out a cause of action against the excipient.*

Ground 2

6. *In paragraph 17 of the respondent's particulars of claim, the respondent pleads that: "but for the defendant's breach described above, the plaintiff suffered damages for the loss of 2.5 Bitcoins".*
7. *In prayer 1 of the respondent's particulars of claim, the respondent prays for judgment against the excipient for: "Return of 2.5 Bitcoin;".*
8. *The excipient has not pleaded that he was at any stage the own Bitcoin of which he is or was the owner.*
9. *The respondent has furthermore not pleaded any facts which allege that the excipient is in possession (at the time of service of the summons) of Bitcoin owned by the respondent.*

Ground 3

10. *In paragraph 18 of the respondent's particulars of claim, the respondent pleads that: "Despite demand, the defendant has failed to satisfy the plaintiff's damages".*
11. *The respondent has failed to plead any facts and or make any averment(s) upon which a causal link is or could possibly be established, upon which any of the breaches as alleged by the*

respondent could on any interpretation thereof prove or establish a loss/damages suffered by the respondent.

12. Moreover, the respondent has failed to plead how it calculate its damages and or what such damages are alleged to be.

Ground 4

13. The respondent claim in the alternative in prayer 2 of its particulars of claim to prayer 1 (i.e. the return of 2.5 bitcoin) for payment in an amount equivalent to the value of 2.5 bitcoin as at the date of judgment.

14. The respondent fails to plead any facts in support of the alternative relief and in which manner payment in an equivalent amount to the value of 2.5 bitcoin is to be made and or assessed by the above Honourable Court.

Ground 5

15. In paragraph 12 and 13 of the respondent's particulars of claim the respondent pleads inter alia that the alleged sale of his cryptocurrencies was perpetrated by an 'unknown perpetrator'.

16. In the circumstances of the foregoing the respondent fails to plead any wrongdoing by the excipient. The respondent relies on the alleged wrongdoing as perpetrated by an unknown person and or entity. As such there is no basis in fact or in law to hold the excipient liable in any manner for the alleged loss/damages suffered by the respondent".

[8] In order to put matters into perspective, it is prudent to restate some of the clauses of the agreement between the parties which are relevant for the purposes of this discussion and which are as follows:

“Terms and Conditions: Our Condition of Use

- (i) Trading on our site could result in financial gain or loss! Trading by means of buying or selling Crypto Coins cannot be reversed! AltCoin Trader will not be liable for any loss whatsoever resulting in trading on our site.*
- (ii) Users are cautioned to take care when trading as an error could result in a loss and is irreversible.*

[9] It has been decided in a number of cases that when interpreting a document, the Court must start with the ordinary grammatical meaning of the words used in the document. The terms of the agreement or contract must be interpreted purposively and the document must be considered as a whole and not in a selective manner. Although it is not ideal for the Court to interpret a contract at the exception stage of the proceedings, in casu, the first complaint by the excipient is based on the exclusion of liability clause by the excipient in the agreement. Because the excipient has been excluded from liability for losses that a user may suffer when trading on the excipient’s platform, so the argument went, then the respondent’s particulars of claim do not disclose a cause of action.

[10] In the recent past, the Constitutional Court had an opportunity to deal with the issue of interpretation of documents in *University of Johannesburg v Auckland Park Theological Seminary and Another (CCT 70/20) [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (11 June 2021)* wherein it stated the following:

“Paragraph 65: This approach to interpretation requires that ‘from the outset one considers the context and the language together, with

neither predominating over the other’. In *Chisuse*, although speaking in the context of statutory interpretation, this Court held that this ‘now settled’ approach to interpretation, is a ‘unitary’ exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.

Paragraph 66: The approach in Endumeni ‘updated’ the position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to Endumeni that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract’s factual matrix, its purpose, the circumstances leading up to its conclusion, and knowledge at the time of those who negotiated and produced the contract.

Paragraph 67: This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded.

Paragraph 69: Let me clarify that what I say here does not mean that extrinsic evidence is always admissible. It is true that a court’s recourse to extrinsic evidence is not limitless because ‘interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses’. It is also true that ‘to the

extent that evidence may be admissible to contextualise the document (since ‘context is everything’) to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible’. I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight.”

[11] The contention of the excipient would be correct if a narrow interpretation of the exclusionary clause were to be adopted. The operative word in the agreement concluded between the parties is ‘*trading*’ which should be interpreted and considered in the context and purpose of the whole agreement between the parties. There is no definition of the word trading in the agreement. However, the only meaningful and purposive interpretation that can be ascribed to the word trading in the context and purpose of the agreement means the buying and selling of Crypto Currencies. It is undisputed that in terms of the agreement trading on the website of the excipient is allowed to persons who are registered as users of the excipient’s platform.

[12] It is not in dispute that the excipient has committed itself to provide the most secure, stable and user-focused services in digital currencies to its customers. It should be recalled that the profile of the respondent on the excipient’s

website was in May 2019 accessed by an unknown person or perpetrator who traded on the account of the respondent without the respondent's consent or authority. The irresistible conclusion is that the respondent's cause of action is based on the agreement concluded between the parties and therefore the respondent's particulars of claim have sufficient particularity to sustain a cause of action. In the result, the exception falls to be dismissed on this ground.

[13] There is no merit in the excipient's contention that the respondent has not pleaded that it was the owner of bitcoins and furthermore, failed to quantify its claim for damages and to furnish the value of the bitcoins it is claiming return of. There is no dispute that the respondent had an account with the excipient which was used for trading in crypto-currencies. The bitcoins were also stored in the account of the respondent. In my view the value of the bitcoin is easily determinable and the trial court will be in a position to determine the value of the bitcoin and or the damages suffered by the respondent in this regard. Whether or not the exclusionary clause does absolve the excipient in the circumstances of this case will be determined by the trial Court which will have the advantage of considering and to interpret the terms of the agreement of the parties in the context of the *facta probantia* and *facta probanda* placed before it. As indicated above, it is not for this court at exception stage to interpret and consider the terms of the agreement between the parties. It follows ineluctably therefore that the excipient has failed to discharge the burden resting upon it to demonstrate that on every interpretation that can reasonably be attached to it, the pleading is excipiable.

[14] In *Cherangani Trade and Invest 50 (Pty) Ltd v Razzmatazz (Pty) Ltd and Another (2795/2018) [2020] ZAFSCHC 100 (28 May 2020)* the Court stated the following:

“Paragraph 20: Unnecessary technicality should be avoided during litigation as reliance thereon by a litigant is often aimed at trying to evade judgment on the merits and more often than not, the party relying on a technicality know full well that he/she does not have a proper defence on the merits.”

[15] Courts have in a number of decisions emphasised the point that parties should at all times attempt to bring finality to litigation between them and that unnecessary technicalities which delay the proper ventilation of the real issues to bring the case to finality should be avoided. This is one such matter where the exception is raised, in my respectful view, only for the purposes of delaying the plaintiff from receiving the relief it seeks without incurring further unnecessary costs. It is patently an abuse of the process of the Court which should not be countenance. Such conduct by a litigant deserves to be censured by the Court with a punitive costs order.

[16] In the circumstances, the following order is made:

The exception is dismissed with costs on the scale as between attorney and client.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 29th August 2022

Date of Judgment: 12th September 2022

For the Excipient: Advocate CB Garvey

Instructed by: Otto Krause Attorneys
Tel: 011 675 2899
anastasia@ottokrause.co.z

For the Respondent: Advocate SJ Mushet

Instructed by: Gittins Attorneys Inc
Tel: 010 001 2002
ashley@gittins.co.za
BAS1/0001