REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER : 22/1508

DELETE WHICHEVER IS NOT APPLICABLE		
(1)	REPORTABLE	NO
(2)	OF INTEREST TO OTHER JUDGES	NO
(3)	REVISED	
_____ DATE		_____ SIGNATURE

In the matter between:

LYNNE ADRIENNE RAPHAELY **First Plaintiff**

LYNNE ADRIENNE RAPHAELY N.O. **Second Plaintiff**

and

OCTAGON FINANCIAL SERVICES (PTY) LTD **Defendant**
(Registration No. 2003/032077/07)

J U D G M E N T

VAN DER BERG AJ

[1] This is an exception by the defendant to the plaintiffs' particulars of claim. The parties are referred to as in the action.

PLEADINGS AND EXCEPTION

[2] The relevant paragraphs of particulars of claim read as follows:

> *"**THE FIRST ACTION***
>
> *1. The First Plaintiff is LYNNE ADRIENNE RAPHAELY…*
>
> *2. The Second Plaintiff is Lynne Adrienne Raphaely N.O.…cited in her capacity as the executor of the estate of the late JOHN MICHAEL ABRO…*
>
> *3. …*
>
> *4. …*
>
> *5. During or about 2020, the Willem Trust (of which the First Plaintiff is a trustee) brought an action against Octagon relating to Octagon's breach of its agreement between it and the Willem Trust (the "**First Action**").*
>
> *6. On 1 February 2021, Octagon* [the defendant] *delivered a plea in the First Action in which, inter alia, it:*
>
> *6.1 Denied contracting with Willem Trust*
>
> *6.2 Alleged that, during or about January 2019, it contracted with the First Plaintiff and John Michael Abro ("**Abro**") in their*

personal capacities to 'provide the First Plaintiff and Abro with advice in connection the investment of funds'.

6.3 Pleaded out the terms of this agreement.

7. The Willem Trust denies that the First Plaintiff and Abro contracted with Octagon in their personal capacities, and contend that the agreement was at all times between the Willem Trust and Octagon.

8. However, and in the alternative to the First Action, the Plaintiffs issue this action ex abundante cautela, in the event that this Court finds that the agreement was indeed concluded with the First Plaintiff and Abro in their personal capacities."

(The underlining appears in the particulars of claim.)

[3] The plaintiffs then allege in paragraph 9 that "*the First Plaintiff, Abro and Octagon*" concluded an oral agreement. The terms of the agreement are pleaded, and it is alleged that the defendant breached the agreement and that the plaintiffs suffered damages.

[4] The defendant served a notice in terms of rule 23 to remove causes of complaint. Thereafter, there having been no reaction from the plaintiffs, the defendant filed a notice of exception containing four grounds of exception. However, the defendant only proceeds with the third and fourth grounds of exception, set as follows in the notice of exception:

"3. ***THIRD GROUND***

3.1 In paragraph 8 of the particulars, the plaintiff has alleged that in

the alternative to the first action (the one lodged by the Trust according to the plaintiff), the plaintiff has issued the current action ex abundate cautela *in the event that the above Honourable Court finds that the agreement was indeed concluded with the plaintiff and Abro in their personal capacities.*

3.2 The plaintiff should be aware of whether or not she entered into an agreement with the defendant. It is improper, prejudicial to the defendant and abusive of the process of Court for this question to be left for the Court to decide. Whether or not an agreement was concluded between the plaintiff and the defendant is fully within the knowledge of the plaintiff.

3.3 In the circumstances, the particulars are vague and embarrassing, alternatively*, lack averments necessary to sustain a cause of action and the defendant would be prejudiced were it required to plead thereto.*

4. ***FOURTH GROUND***

4.1 In paragraph 8 of the particulars, the plaintiff has alleged that the current action has been instituted out of the abundance of caution (in the event that this Court finds for the defendant in the action between the Trust and Octagon on the question of the agreement).

4.2 However, nowhere has the plaintiff sought to explain the basis on which the current action is an alternative to the first action. This is more so when regard is had to the fact that on the plaintiff's own version, there is an action between the Trust and the defendant.

4.3 Consequently, the particulars are vague and embarrassing,

alternatively*, lack averments necessary to sustain a valid cause of action and the defendant would be prejudiced were it required to plead thereto."*

TEST ON EXCEPTION

[5] The test for upholding an exception has been described as follows (footnotes omitted):

> *"If evidence can be led which can disclose a cause of action or defence alleged in a pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action or defence…The test on exception is whether on all possible readings of the facts no cause of action is made out. It is for the excipient to satisfy the Court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts."*[1]

[6] In *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and another* (No 1) 2010 (1) SA 627 (C) the court said:

> *"It is trite law that an overly technical approach by the court with regard to exceptions and irregular procedure should be avoided. The court does not look too critically at a pleading.*
>
> *Whether a pleading is vague and embarrassing on the ground of lack of particularity depends on whether it complies with the provisions of the relevant rules of the Uniform Rules of Court. Prejudice to a litigant faced with an embarrassing pleading lies ultimately in an inability to prepare properly to meet an opponent's case."*

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1 Harms, Civil Procedure in the Superior Courts, para B23.3

[7] Certain allegations expressly made may carry with them implied allegations and the pleading must be so read. [2]

DISCUSSION

Third Ground

[8] In its third ground it is stated that the plaintiffs should be aware of whether or not they entered into an agreement with the defendant, and that it is improper and prejudicial to the defendant for this question to be left for the court to decide as this is fully within the knowledge of the plaintiffs. This may be a relevant factor at the trial in considering the merits of the plaintiffs' claims but has no bearing on whether the particulars of claim are vague and embarrassing or whether they sustain a cause of action. This ground of exception cannot succeed.

Sun International

[9] The defendant's attack is aimed at paragraph 8 of the particulars of claim. Mr Hoffman (for the plaintiffs) relied on *Vlok N.O. v Sun International* 2014 (1) SA 487 (GSJ) ("*Sun International"),* whilst Ms Segeels-Ncube (for the defendant) sought to distinguish the case.

[10] In *Sun International* the plaintiff instituted an action against Sun on the basis that Sun made an offer in terms of section 124 of the Companies Act. Sun adopted the attitude that it was not the offeror. The plaintiff then issued

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[2] *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W), at 902H-903E

summons against SISA and pleaded:[3]

> *"If, on a proper construction and interpretation of the Offer, it is in fact found that SISA was the actual offeror and not Sun (via SISA), then the plaintiffs claim the relief sought herein from SISA in its own capacity and this summons is therefore conditional on that finding."*

[11] The particulars of claim in that matter proceeded to record an intention to apply for the consolidation of the action against Sun and the action against SISA in terms of rule 11. The summons against SISA was met with an exception.

[12] Snyckers AJ said:

> "*[133] No doubt the the formulation of the claims against SISA strikes one as anomalous…"*
>
> [134] *It is not only the conditionality of the claim that is potentially problematic. It is the fact that the only allegations in the claim as to who the actual offeror is are destructive of the claim itself.*"

[13] The court however dismissed the exception and held:

> *"[141] In the instant case much depends in this regard on the question whether the particulars of claim must be read as basing the condition upon a finding in the Sun action (which can only be contemplated as a future contingency when the present claim is being advanced). If this is so, then the exception must be sound, based on the principle recognised in* Nel,[4] *that the cause of action, whether conditional or not, must be complete*

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[3] Paragraph 14

as at the date of institution of proceedings.

[142] I do not think the particulars need to be construed thus. If the instant claim is to be read in isolation, then it can reasonably be taken as pleading an implicit alternative allegation that SISA is the offeror. 'If it be held' that this is indeed so, would then, in the absence of any consolidation of the actions, be a finding in this action, not in the Sun action.

[143] The finding would relate to a state of affairs existing as at the time action was instituted - who was, at all material times, the offeror? There would then be no problem entailed by advancing a claim conditional upon a future contingency." (Own emphasis)

[14] *Sun International* applies to this action: there is an "implicit alternative allegation" in the particulars of claim that Abro and the first plaintiff in their personal capacities were the contracting parties. If the court does make such a finding in the first action, it will be a finding that they were at all material times the contracting parties.

Consolidation

[15] In *Sun International* the plaintiff pleaded that it had an *intention* to consolidate the actions, but the actions had not yet been consolidated at the stage when the exception was argued.[5] This allegation does not appear in

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[4] Nel is a reference to *Nel v Silicon Smelters (Edms) Bpk en 'n Ander* 1981 (4) SA 792 (A) to which extensive reference was made in *Sun International*

[5] Paragraph 15

the particulars of claim in this matter. The defendant argued that this omission renders the particulars of claim excipiable, and relied on the following dictum in *Sun International*:

> "*[146]…It seems to me that Nel must be regarded as sufficient support for allowing the plaintiffs to achieve joinder by the clumsier route of amendment and consolidation, at least in circumstances where one is not viewing the SISA action in isolation. Had I viewed the SISA claim in isolation, I would have upheld the exception.*"

[16] The present (i.e. second) action is not viewed in isolation. The plaintiffs have sufficiently pleaded the first action, the connection between the first action and second action, and the reason for having issued the second action. An intention to consolidate does not form part of the plaintiffs' cause of action, and the omission of such an allegation also does not render the particulars of claim vague or embarrassing.

[17] It is so that the possibility exists that consolidation may not be effected and that the second action may for some reason be set down before the first action (which may be problematic for the plaintiff), but this is not a relevant consideration in determining whether the plaintiffs' particulars of claim are excipiable at this stage.

Finding in First Action

[18] In *Sun International* the claim was dependent on a finding in the other action that SISA was the actual offeror (i.e. a positive finding) *and* that Sun was not the offeror (i.e. negative finding), whereas the plaintiffs' claim in this matter

is conditional only on a positive finding in the first action. It was submitted that for this reason *Sun International* is distinguishable.

[19] It was submitted on behalf of the plaintiffs that this argument does not fall within the ambit of the notice of exception. For purposes of this judgment I shall assume that it does.

[20] In my view *Sun International* is not for this reason distinguishable. The plaintiffs have made their claim conditional that a specific finding should be made in the first action (i.e. that the agreement was indeed concluded with the First Plaintiff and Abro in their personal capacities). The plaintiffs have limited their claim by *not* making it conditional on a finding that the Willem Trust was *not* a contracting party. If anything, the plaintiffs may have prejudiced themselves by defining the condition so narrowly. This does not render the particulars of claim excipiable.

CONCLUSION AND ORDER

[21] Accordingly, this case is not distinguishable from *Sun International* and the exception stands to be dismissed. Costs should follow the result.

[22] The following order is made:

The exception is dismissed with costs.

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VAN DER BERG AJ

APPEARANCES

For the plaintiffs:

Adv J M Hoffman
Instructed by:
Tanners & Associates

For the defendant:

Adv L Segeels-Ncube
Instructed by:
Webber Wentzel

Date of hearing: 19 October 2022

Date of judgment: 24 October 2022