REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION,

JOHANNESBURG

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: N/A

....

DATE 23 September 2023

SIGNATURE

CASE NO: 16904/2020

IN THE MATTER BETWEEN

ZAMLINX CC **EXCIPIENT**

and

TIRE WORLD EXPORTS (PTY) LTD **RESPONDENT**

In Re:

ZAMLINX CC **PLAINTIFF**

and

TIRE WORLD EXPORTS (PTY LTD **FIRST DEFENDANT**

MARK CHRISTOPHER ANTHONY MEAD **SECOND DEFENDANT**

JUDGMENT

BENSON AJ

Introduction

[1] This is an opposed Exception in terms of which the plaintiff, as excipient, has raised an objection to the respondent's claim in reconvention dated the 7th of May 2021. The plaintiff contends that the claim in reconvention is vague and embarrassing and fails to articulate a discernible cause of action.

[2] The parties will be referred to in this judgment as in the main action so as to avoid any confusion.

Background

[3] The plaintiff's claim as against the first and second defendants is based on a credit agreement and suretyship respectively, which was concluded in or about 2010. The first defendant placed various orders with the plaintiff over a period of time, to handle, load and deliver tyres on its behalf, to the first defendant's customers in Zambia. The plaintiff asserts that it duly attended to its obligations in terms of the orders placed by the first respondent, and that as of 31 October 2019, the first defendant was indebted to the plaintiff in the sum of R466 247.50, relating to services rendered by the plaintiff for the period of 5 September 2019 to 31 October 2019, and as evidenced by the

plaintiff's statement dated the 31st of March 2020, and annexed as Annexure "POC2" to the particulars of claim.

[4] The plaintiff further pleads that despite numerous demands made by the plaintiff upon the first defendant, the first defendant, although admitting indebtedness, "*sought disingenuously to set off monies allegedly owing to the plaintiff to it as a result of an alleged loss suffered by it due to a robbery which took place at the plaintiff's erstwhile premises*".

[5] In the circumstances, argues the plaintiff, the attempted set off cannot be legally sustained having regard to the express terms of the credit agreement, and due to the fact that the first defendant's alleged claim for damages is unliquidated and unsustainable as a matter of law.

[6] In the first defendant's claim in reconvention, the first defendant pleads that in or about January 2012, the parties concluded a verbal agreement, where the plaintiff agreed to transport and/or carry goods on behalf of the first defendant from time to time, which would include the loading and/or offloading and/or delivery and/or storage and safekeeping of such goods, as and when required to do so by the first defendant.

[7] The first respondent asserts that pursuant to the conclusion of the verbal agreement, the plaintiff breached the agreement in that it has "to date and despite written demand by the first defendant, refused and/or neglected and/or failed to deliver and/or return the goods specified in Annexure "A"" to the first defendant. Annexure A lists approximately 15 categories of goods in differing quantities. The first defendant accordingly pleads that the plaintiff is indebted to it in the sum of R 1078 057,80.

[8] The plaintiff, in its exception, avers, *inter alia*, that nowhere within the ambit of the agreement as pleaded by the first respondent, is there any reference to the said goods, no specific averment relating to an agreement or agreement being concluded between the parties in relation to these specific goods, nor any alleged obligation on the plaintiff to provide a service in relation to the goods listed in annexure "A", nor to what that service allegedly encompassed and no reference to whom the said goods were to be delivered on the first defendant's behalf.

[9] As a result, argues the plaintiff, the first defendant's claim in reconvention is vague and embarrassing and fails to set out a cause of action.

Point in limine

[10] In answer to the exception, and by way of a point *in limine*, the first defendant argued that the plaintiff, as excipient, failed to serve and file the obligatory and peremptory Rule 23(1)(a) notice on the first respondent, prior to filing its exception. This point was abandoned by Mr. Stewart on behalf of the first respondent, and in my view, rightly so. Whilst I make no finding in this regard, one would assume in the ordinary course that a party that is dissatisfied with the non-compliance or non-observance of the rules, is entitled to raise an irregular step at the appropriate time. It is accordingly not necessary for this Court to consider the point further.

Legal Principles Applicable to Exceptions

[11] In considering an exception, the Court must have regard only to the facts set out in the pleading giving rise to the complaint. No extraneous facts may be adduced by the parties to argue that the pleading is excipiable, or that it is not[1]. It is trite that an exception on the basis that a pleading is vague and embarrassing strikes at the formulation of the cause(s) of action set out therein.

[12] A court must be persuaded that upon every possible interpretation of the pleading, no cause of action arises. Accordingly, and when pleading, the pleader must set out a clear and concise statement of the material facts upon which it relies for its claim, with sufficient particularity to enable the other party to understand the case it is to meet, and to be placed in a position to reply thereto[2].

[13] In order for an excipient to succeed with an exception, the excipient must demonstrate that the defect(s) complained of, strike at the heart of the claim being attacked, that the excipient cannot discern what claim it has to meet[3], and that the claim is vague and embarrassing to the extent that it causes embarrassment, and that such embarrassment amounts to prejudice. The principles applicable to determining exceptions based on vagueness and embarrassment arising out of lack of particularity in particular, are by now well entrenched in our law, as demonstrated by the decisions such as ***Trope v***

[1] ***Viljoen v Federated Trust Limited*** 1971 (1) SA 750 (O) at 754F-G
[2] ***Minister of Safety and Security v Slabbert*** [2010] 2 All SA 471 (SCA) at para [11]
[3] ***Jowell v Bramwell-Jones & Others*** 1998 (1) SA 836 (W) at 899E-F, 905E-I

South African Reserve Bank 1992(3) SA 208 (T) and ***Evans v Shield Insurance Company Ltd*** 1980 (2) SA 814 (A). It is unnecessary to again restate these principles, suffice it to say that the material facts which a pleader is required to set out in support of its claim must allege every fact which it would be necessary to prove in order to be granted judgment, in order for it toe regarded as a complete cause of action. A litigant must identify such issues upon which it seeks to rely, and in respect of which evidence will be led, in an intelligible and lucid format.

The Claim in Reconvention

[14] As argued by Mr. Kaplan on behalf of the plaintiff, no particularity is pleaded in the claim in reconvention as to the goods in question, when delivery was meant to take place, and to whom. One is simply requested to place reliance on Annexure “A” thereto, in order to identify the merx in question. No detail surrounding the calculation of the quantum is furnished, rendering the possible quantification of the claim entirely impossible.

[15] The claim in reconvention is accordingly difficult to grasp, and requires several assumptions to be made as one peruses to it. For instance, and but for the reference to “Goodyear” products in the Annexure, one would be left unable to guess that the “goods” referenced, are even tyres.

[16] It is accordingly, when assessing the claim in reconvention (and even adopting a holistic approach in considering the remaining pleadings), impossible to discern from the claim in reconvention, which services were required by the first defendant from the plaintiff, when such serves were required, why they were not rendered, to whom the goods ought to have been

delivered, the period for when they may have been entrusted to the plaintiff, and the purpose thereof.

[17] Whilst a general agreement is pleaded, it relates to the year 2012. It is accordingly not clear when the claim even arose in all of the circumstances, nor how it is quantified as I have mentioned above.

Conclusion

[18] Having considered all of the arguments and submissions presented to me in determining the exception, and even in adopting a holistic approach to the consideration of the pleadings as a whole, I am of the view that the exception is valid, and ought to be upheld.

[19] In the result I make the following orders:

[19.1.] The exception is upheld;

[19.2.] The first defendant's claim in reconvention is set aside;

[19.3.] The first defendant is granted leave to file an amended claim in reconvention withing 15 days of this Order being loaded onto Caselines;

[19.4.] The first defendant is ordered to pay the costs of this exception, including the reserved costs of the 25th of January 2023.

_____

G.Y. BENSON
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances:

Date of hearing	:	24 May 2023
Date of Judgment	:	23 September 2023
Date Judgment Delivered	:	Date of uploading to CaseLines

For the Excipient	Adv. J. Kaplan
Instructed by	Waks Attorneys Notaries & Conveyancers
For the Respondents	Adv. M.E. Stewart
Instructed by	Northmore Montague Attorneys