IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: (2) OF INTEREST TO OTHER JUDGES: (3) REVISED: Date: Signature: ____________

CASE NO: 007859/2022

DATE:

In the matter between:

PETZER, ALEXANDER ROYCETON	Plaintiff
and	
MACFARLANE, NEIL STEVEN	First Defendant
ROYCETON ENGINEERING CC (Registration No. 2000/024864/23)	Second Defendant

Coram: Ternent AJ

Heard on: 23 May 2023

Delivered: 26 September 2023

Summary:

JUDGMENT

TERNENT, AJ:

[1] This matter comes before me by way of an exception in terms of Rule

23(1) which has been taken by the first defendant to the plaintiff's particulars of claim. The first defendant delivered a notice to remove the causes of complaint of which he complains and the plaintiff did not respond.

[2] The first defendant objects to the particulars of claim on a number of grounds, which grounds he contends renders the particulars of claim vague and embarrassing justifying that the plaintiff's particulars of claim be struck out and set aside together with an order for costs. Insofar as the exception is upheld, the plaintiff is to be afforded an opportunity of amending his particulars of claim within ten days of the service of the Court's order by e-mail.

[3] In considering the exceptions raised, I am required to deal with them *"sensibly"* and remain alive to their purpose, *"weed[ing] out cases without legal merit"*.[1]

[4] The excipient must establish that upon every reasonable interpretation of the particulars of claim (including the documents upon which it is based), no cause of action is disclosed.[2]

[5] The decision of ***Living Heads v Ditz***[3] summarises the approach a Court must take when an exception is raised. As such, I can accept the truth of the allegations in the particulars of claim. An exception is not meant to embarrass an opponent but to expose the weakness in the case so that the case will come to an end, and on any construction of the particulars of claim, no cause of action must be established.

[6] The particulars of claim discloses that the agreement upon which the

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1 ***Telematrix (Pty) Ltd v Advertising Standards Authority SA*** 2006 (1) SA 461 (SCA), para [3] at pages 465-466

2 ***Pete's Warehousing and Sales CC v Bowsink Investments CC*** 2000 (3) SA 833 (E) at 839G-H

3 2013 (2) SA 368 (GSJ) at paragraph [15]

plaintiff relies is a termination agreement which was concluded between the plaintiff, in his personal capacity and in his representative capacity, as a member of the second defendant, with the first defendant. The terms thereof are set out at paragraph 15 of the particulars of claim.[4] In the alternative reliance is placed on section 36 of the Close Corporations Act.[5]

[7] The relief sought is declaratory in nature in that the plaintiff seeks, as a consequence of this termination agreement, that he be declared the sole member of the corporation with effect from 31 August 2001, alternatively that the defendant's membership is terminated with effect from 31 August 2001 so that he will not benefit any further as a member of the corporation.

[8] In determining whether the particulars of claim is vague and embarrassing, Southwood J said that:

> *"In McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 op 23 het die Hof die volgende omskrywing van 'skuldoorsaak' aanvaar:*
>
> *'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'*
>
> *maar die Hof het die volgende kwalifikasie bygevoeg:*
>
> *'It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'*
>
> *Hierdie kwalifikasie beklemtoon die belangrike onderskeid tussen die facta probanda, dws die feite wat bewys moet word om 'n skuldoorsaak te openbaar, en die facta probantia, dws*

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[4] CaseLines, 01-11 to 01-13

[5] Act 69 of 1984 (as amended)

die feite wat daardie feite bewys - Makgae v Sentraboer (Koöperatief) Bpk (supra op 244F - G)

In Makgae v Sentraboer (Koöperatief) (supra) het Ackermann R tot die gevolgtrekking gekom op 245D - E

'dat 'n gedingvoerder, ten einde te verseker dat besonderhede van vordering nie eksipieerbaar is op grond daarvan dat dit "bewerings mis wat nodig is om die aksie te staaf" nie, moet toesien dat die wesenlike feite (dws die facta probanda en nie die facta probantia of getuienis ter bewys van die facta probanda nie) van sy eis met voldoende duidelikheid en volledigheid uiteengesit word dat, indien die bestaan van sodanige feite aanvaar word, dit sy regskonklusie staaf en hom in regte sou moet laat slaag tvb die regshulp of uitspraak wat hy aanvra' and;

There is no exhaustive test to determine whether a pleading contains sufficient "particularity" for the purposes of this subrule but it is essentially an issue of fact: a pleading contains sufficient particularity if it identifies and defines the issues in such a way that enables the opposite party to know what they are."[6]

[9] In the commentary to the Rule,[7] the purpose of pleadings is not to set out evidence but the material facts upon which the plaintiff relies, underpinning its cause of action, which in this case is a termination agreement in which the plaintiff alleges that the 10% shareholding acquired by the first defendant, in lieu of his employment services as a salesman, must, by agreement, revert to him.

[10] It was submitted to me by the respondent's counsel that the applicant's complaints do not expose an excipiable cause of action, and any "*vagueness*" could be remedied by a request for further particulars under Rule 21. Also the excipient has approached this Court under the incorrect procedural rule and should rather have brought an application under Rule 30 which permits for proper complaints under Rule 18 and

[6] ***Aartappel Koöperasie Bpk v PriceWaterhouseCoopers Ing en Andrere*** 2001 (2) SA 790 (T) at 798 A – E and 798F-799J

[7] Erasmus, Superior Court Practice D1-232

more particularly Rules 18(4) and Rule 18(6).

[11] *As Cloete J said in Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen 1992 (4) SA 466 (W) at 469J--470, '. . . if a pleading both fails to comply with Rule 18 and is vague and embarrassing, the defendant has a choice of remedies' (i.e. to proceed by way of Rule 23 or Rule 30). I agree with counsel that the crucial distinction between Rules 23 and 30 may be summarised as follows:*

11.1(a) an exception that the pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded; whereas

11.2(b) Rule 30 may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity; it is not necessary that the failure to plead material facts goes to the root of the cause of action.[8]

[12] In the decision of ***Trope and Others v South African Reserve Bank***[9] Grosskopf JA made observations about exceptions and more particularly those that a pleading is vague and embarrassing:

> *"… Previously "minor blemishes in, and unradical embarrassments caused by, a pleading" could be cured by further particulars (Purdon v Muller 1961 (2) SA 211 (A) at 215F), but requests for further particulars to pleadings are no longer competent. Exceptions that pleadings are vague and embarrassing have been allowed in the past even though the embarrassment might have been removed by the furnishing of particulars in response to a request. (See Osman v Jhavary & Others 1939 AD 351 at 365-366, a case which dealt with the*

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[8] ***Jowell v Bramwell - Jones and Others*** 1998(1) SA 836 (W) at 902 E-G

[9] 1993 (3) SA 264 (A) at 267-268

practice at that time pertaining in Natal.) The position is now regulated by Rule 23(1) of the Uniform Rules of Court, which provides that, where a party intends taking an exception that a pleading is vague and embarrassing, he shall first afford his opponent an opportunity of removing the cause of complaint. The embarrassment and consequent prejudice complained of can indeed often be removed by an appropriate amendment providing further and better particularity. No such preliminary step is required, on the other hand, where the exception is taken on the ground that the pleading lacks averments necessary to sustain an action or defence.

The respondent in the present matter duly gave the appellants notice in terms of Rule 23(1) that unless they removed the cause of complaint set out in the notice it intended taking an exception to their particulars of claim on the ground that they were vague and embarrassing. The appellants thereupon amended their particulars of claim, but the respondent was still not satisfied and gave them notice once again that it intended taking an exception that their amended particulars of claim were vague and embarrassing. Their response to this request was that they did not intend amending their particulars of claim, which they averred were in order. The respondent then took an exception in terms of Rule 23(1) on the ground that the appellants' amended particulars of claim were vague and embarrassing. There was never any suggestion that the respondent also objected to the particulars of claim on the ground that they did not disclose a cause of action. The exception was nothing more than it purported to be, i.e. an exception that the amended particulars of claim were vague and embarrassing. Both in substance and in form the notice of exception unequivocally assails the manner in which the particulars of claim were formulated and not the validity of the causes of action sought to be alleged therein. That is how the

parties treated the exception throughout and how the learned judge a quo viewed it and dealt with it in his judgment. The following statement appears in the judgment of the court a quo, supra, at 217H-I, immediately preceding the order:

"Finally, I should state that I have not considered it necessary to deal with certain aspects of the law raised in the very comprehensive arguments advanced on behalf of the plaintiffs. Those aspects are, in my judgment, apposite in the case of an exception on the grounds that no cause of action is disclosed by the pleadings, but are not appropriate for purposes of the present exception."

[13] Further Grosskopf [10] stated:

"It is trite that a party has to plead – with sufficient clarity and particularity – the material facts upon which he relies for the conclusion of law he wishes the court to draw from those facts (Mabaso v Felix 1981 (3) SA 865 (A) at 875A-H; Rule 18(4)). It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it. (Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 792J-793G).

"In the case of S.A. Motor Industry Employers' Association, supra, this court likewise had to determine the true nature of an exception to a plaintiff's particulars of claim. The exception taken in that case was that the plaintiff had not "pleaded the material facts" on which it relied for a particular averment and, because of such failure, the defendant did not know "on what basis" the plaintiff relied. The court concluded at 97C-D that the true nature of the exception in that case was "that the

[10] at 273

> *defendant was embarrassed by the vagueness or insufficiency of the facts averred……"*

[14] In my view these aforesaid principles equally apply to the exception in this matter.

THE CAUSES OF COMPLAINT

[15] The first exception is directed at paragraph 10 of the particulars of claim. It is pleaded, in this paragraph, that in June 2001 the plaintiff and the second defendant entered into an oral agreement identified as the employment agreement with the first defendant. The first defendant was employed as a sales representative and the scope of his employment entailed broadening the second defendant's client base and attracting new customers to the second defendant. In addition, he was given the use of a motor vehicle to carry out his duties with the cost of fuel and maintenance in the course of his duties as an employee to be paid by the second defendant. It is furthermore averred that he would be remunerated as to 10% of the members' interest in the corporation by making an initial contribution and providing further employment linked contributions for which he would receive no salary or a discounted salary .

[16] The first defendant complains that he should have been supplied with particulars of his employment in writing as required in terms of the provisions of section 29 of the Basic Conditions of Employment Act.[11] As such, the plaintiff is requested to provide a copy of the written employment agreement.

[17] As already set out above the cause of action is based on a termination agreement. To the extent that the plaintiff pleads the conclusion of the oral employment agreement with the first defendant, and which terms

[11] Act 57 of 1997

are set out in paragraph 10, I am of the view that this is unnecessary history, which need not have been pleaded at all.

[18] Accordingly, the employment contract not only does not exist but is not relevant to the cause of action which seeks to terminate the first defendant's membership of the second defendant.

[19] There is no suggestion that the provisions of Rule 18(6) of the High Court Rules have not been complied with as there is no contention that the cause of action stems from the employment agreement or that the contract is written. Only in the face of a written contract which underlies the cause of action is a true copy thereof to be annexed to the pleading. There is no merit to this complaint.

[20] The second exception is directed at paragraph 10.4.1 of the particulars of claim. This relates to the remuneration which the first defendant would receive by virtue of his employment as a sales representative. The first defendant complains that he cannot glean from the particulars of claim what contributions were made by him to obtain his 10 % member's interest.

[21] According to the termination agreement, the member's interest held by the first defendant would be transferred to the plaintiff at no value.

[22] In this regard, the plaintiff pleads:

"10.4 The defendant would be entitled to receive 10% of the members' interest in the corporation:

10.4.1 By virtue of an initial contribution by the defendant of 10% of the total value of the contribution by the plaintiff in respect of the members' interest of the corporation as reflected in the founding statement

as at date of incorporation thereof;

10.4.2 In lieu of the further contribution to be made by the defendant to the corporation in the form of the services which the defendant was to render to the corporation in terms of the employment agreement, subject thereto that:

10.4.2.1 the defendant would forfeit any entitlement to receiving a basic salary commensurate with such services; alternatively

10.4.2.2 the defendant would be paid a basic salary of less than what would be commensurate with the services to be rendered by him in terms of the employment contract.

As provided in Rule 18(4) of the High Court Rules 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."

[23] It is apparent that the complaint could have been raised under Rule 30 if the employment contract was the primary cause of action, which it is not. That in and of itself renders the complaint impermissible.

[24] In addition, Rule 18(4) does not apply as this information is historical and irrelevant to the cause of action underpinning the plaintiff's claim. There is no merit to this complaint.

[25] The third exception is directed at paragraph 10.4.2.2 of the particulars of claim. The complaint is that the allegations are vague and embarrassing in that the plaintiff fails to reference what is meant by a *"further contribution"* and which of the options mentioned therein i.e. receiving no salary or a discounted salary during his employment were actioned. I disagree. Although the option to be exercised is not pleaded this information is also historical and not relevant to the cause of action. There is no merit to this complaint.

[26] The fourth exception is directed at paragraph 12 of the particulars of claim. This paragraph commences under the heading *"The Termination Agreement"*, and sets out the plaintiff's cause of action and the material facts in support thereof in the paragraphs that follow. The plaintiff avers that the first defendant did acquire an interest in the second defendant, pursuant to his employment agreement, and the founding statement was amended to record his 10% interest which was registered by the Registrar of Companies on 15 June 2001[12]. It is this interest which the plaintiff seeks be returned to him.

[27] In this regard, the first defendant complains that because there is no particularity about the extent and nature of his non-compliance/ breach of his duties as a sales representative, which resulted in the breakdown of the employment relationship and the conclusion of the August 2001 termination agreement, the pleading is vague and embarrassing. I am of the view that the averments in this paragraph do not fall within the framework of the provisions of Rule 18(4) in the sense that these are not material facts underpinning the termination agreement. These facts predated the termination agreement and explain how the termination agreement came about. This is evidence which will no doubt be given in the trial. There is no merit to this complaint.

[28] The fifth and sixth exceptions are directed at paragraphs 15.2.1 and

[12] CaseLines, 01-10, paragraphs 11.2 to 11.3

15.2.2 of the particulars of claim. This paragraph sets out the terms of the termination agreement for which the plaintiff contends. In this regard the plaintiff contends for the term at paragraph 15.2. that:

"15.2 Neither the corporation nor the plaintiff would have any claim against the defendant:

15.2.1 in respect of any losses or expenses incurred by the corporation in consequence of the failure by the defendant to carry out his duties arising from the employment agreement in a satisfactory manner; and/or

15.2.2 for the recovery of any compensation paid to the defendant by the corporation in terms of the employment agreement."

[29] The contention is that this term is vague and embarrassing because there is no detail as to the losses or expenses that may have allegedly been incurred and/or the compensation paid to the second defendant in terms of the employment agreement. Again, I am not of the view that this constitutes a material fact upon which the plaintiff relies for his claim. Paragraph 15.2 sets out an express term that neither the second defendant or plaintiff would have any further claims against each other arising out of the defendant's employment. Accordingly, the first defendant is well able to either admit or deny this term. The complaints have no merit.

[30] The seventh exception is to paragraph 16 of the particulars of claim in which it is contended that on conclusion of the termination agreement the plaintiff gave the first defendant an amended founding statement to enable him to append his signature thereto in confirmation of his resignation as a member of the corporation, a term of the agreement.

The first defendant complains that the plaintiff's failure to aver the date and place where the amended founding statement was handed to him for his signature is vague and embarrassing.

[31] I disagree. This information constitutes secondary evidence. The first defendant, depending on whether he indeed received the founding statement from the plaintiff, can admit or deny the allegation. In due course he can request this particularity with a Rule 21 request for further particulars. There is sufficient particularity for the first defendant to plead.

[32] The eighth exception is directed at paragraphs 17 and 18 of the particulars of claim. The plaintiff contends for an express term that *"The defendant would co-operate with the plaintiff and/or the corporation to give effect to his resignation as a member of the corporation in the terms of the termination agreement"*.[13] The plaintiff pleads that in breach of the termination agreement, and demand, the first defendant has failed to sign and/or deliver a copy of the amended founding statement to him. The first defendant , nevertheless, contends that the plaintiff has failed to provide particularity of when, where and how the first defendant breached the termination agreement. To my mind the further particularity sought can be obtaining using Rule 21 or is a matter for evidence. There is sufficient particularity to enable the first defendant to plead. There is no merit to this complaint.

[33] The ninth exception is directed at paragraph 26.2 of the particulars of claim; an alternative cause of action premised on the provisions of section 36(1)(a), (b) and (c) of the Close Corporations Act.[14] Section 36 provides as follows:

"36. ***Cessation of membership by order of Court***

[13] CaseLines 01-13, paragraph 15.4

[14]

(1) On application by any member of a corporation a Court may on any of the following grounds order that any member shall cease to be a member of the corporation:

(a) Subject to the provisions of the association agreement (if any), that the member is permanently incapable, because of unsound mind or any other reason, of performing his or her part in the carrying on of the business of the corporation;

(b) that the member has been guilty of such conduct as taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business;

(c) that the member so conducts himself or herself in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him or her; or

(d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation: Provided that such application to a Court on any ground mentioned in paragraph (a) or (d) may

also be made by a member in respect of whom the order shall apply.

(2) A Court granting an order in terms of subsection (1) may make such further orders as it deems fit in regard to:

(a) the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or

(b) the amounts (if any) to be paid in respect of the member's interest concerned or the claims against the corporation of that member, the manner and times of such payments and the persons to whom they shall be made; or

(c) any other matter regarding the cessation of membership which the Court deems fit."

[34] It is contended by the first defendant that he is unable to plead to the conclusions in paragraph 26.2 that he is guilty of conduct that has had a prejudicial effect on the carrying on of the second defendant's business, alternatively that his conduct is likely to have a prejudicial effect on the business of the corporation. It is apparent that these are legal conclusions that stem from the provisions of section 36(1)(b) of the Act.

[35] The preceding paragraphs 23, 24 and 25 of the particulars of claim[15] set out the factual basis for the conclusions made in paragraph 26 including those in paragraph 26.2. It is apparent therefrom that the plaintiff contends that the defendant *qua* member over of a period of twenty-one years had little to no dealings with the close corporation and that it has been solely managed by the plaintiff. Accordingly, the first defendant has

15 CaseLines, 01-15 to 01-16

sufficient particularity of the material facts underlying the legal conclusion under the Act and can plead thereto. This complaint has no merit.

[36] The tenth exception is directed at paragraph 26.3. As already stated in relation to paragraph 26.2, a legal conclusion has been pleaded and the factual basis for that conclusion is set out in paragraphs 23, 24 and 25 of the particulars of claim.[16] It too has no merit.

[37] The particulars of claim may not have been drawn with the greatest finesse but it is not, to my mind, wanting in clarity which renders it excipiable, difficult for the first defendant to plead or results in serious prejudice.

[38] At the outset, I put it to the excipient's counsel that the complaints raised appeared to be taken out of context and amounted to an attempt to obtain further particularity rather than attack the cause of action.

[39] It is inappropriate to set aside or strike out a particulars of claim where the exception does not go to the root of the cause of action in the sense that the particulars of claim must be pleaded *de novo*. It is clear, that the first defendant has impermissibly proceeded with an exception in circumstances where the first defendant knows what case he has to meet. The first four complaints, as submitted to me by the first defendant's counsel, seek unnecessary detail to paragraphs which provide a historical introduction[17] to the parties relationship. The six remaining complaints relate to facts which are not material to the cause of action and, can be obtained by a Rule 21 request for further particulars or constitute evidence.

[40] The excipient's counsel submitted, in reply, that the Court can also have

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[16] CaseLines, 01-15 to 01-16

[17] ***Ahlers NO v Snoek*** 1946 TPD 590 at 594

regard to Rule 30 under the formulation of "*further and alternative*" relief. In this regard the Court affirmed in ***Chao v Gomes*** [18] the principle that where grounds are made out for the relief albeit not expressly requested, the Court can make an order setting out the accessory relief. I am not of the view that even Rule 30 would have assisted the excipient. All of the complaints are ill – founded. As such it is unnecessary for me to extend the relief and stray from the express relief sought.

[41] As the first defendant has been unsuccessful in his exception, the costs must follow the result.

[42] Accordingly, I grant an order in the following terms:

1. The first defendant's exception is dismissed;

2. The first defendant is to pay the plaintiff's costs.

P V TERNENT
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 26 September 2023.*

[18] 2012 JDR 0841 GSJ

HEARD ON:	23 May 2023
DATE OF JUDGMENT:	26 September 2023
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