IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 3603/2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED: **NO**
(4)	DATE: **20 JULY 2023**
(5)	SIGNATURE: ***ML SENYATSI***

In the matter between:

COMPUTER USERS COUNCIL OF SOUTH AFRICA PROPERTY HOLDINGS CC	PLAINTIFF
and	
CITY OF JOHANNESBURG	FIRST DEFENDANT
SOUTH AFRICAN ELPHARIWA JUSTICE SELOLO	SECOND DEFENDANT
THE SHERIFF, HALFWAY HOUSE	THIRD DEFENDANT
THE STANDARD BANK OF SOUTH AFRICA LIMITED	FOURTH DEFENDANT
MOODIE & ROBERTSON	FIFTH DEFENDANT

THE REGISTRAR OF DEEDS, PRETORIA SIXTH DEFENDANT

JUDGMENT

SENYATSI J:

[1] This is in opposed exception application which is before this Court at the behest of Standard Bank, the fourth defendant in the action proceedings brought by the plaintiff in the main action. The parties will for convenience sake be cited as in the main action.

[2] Between 2002 and 9 October 2012 the plaintiff was the registered owner of the vacant property described as Portion 5 of Erf 30 Halfway House, Registration Division IR, Gauteng, measuring 1983 square meters, held under Deed of Transfer T15221/2002, also known as 213 Alexander Avenue, Halfway House("the property").

[3] On or about 29 October 2012, the plaintiff learned that the first defendant, the City of Johannesburg had obtained a judgment in respect of summons issued on 6 September 2006 for rates and taxes. Pursuant to the judgment, the property was sold in execution to the second defendant, Mr Selolo on 26 August 2008 and the transfer of the property was finalised on 9 October 2012.

[4] During 2013, the plaintiff launched litigation proceedings and cited six defendants in an action it seeks the rescission of judgment granted in favour of the City of Johannesburg Metropolitan Council, the first defendant, relating to case number 2006/19010 in this Court on 7 March 2008; the rescission and setting aside of the sale in execution of the

property; the rescission and setting aside of the sale in execution of the property on 26 August 2008 by the Sheriff of this Court, Halfway House, cited as the third defendant in the action to Mr Selolo, the second defendant in the main action; the setting aside of registration of the property which occurred in 2012 in the name of the second defendant; the prayer in terms of which the second and third defendants are ordered to procure the re-transfer of the property to the plaintiff ("re-transfer"); the prayer in terms of which the Registrar of Deeds, the sixth defendant, is ordered to give effect to the re-transfer of the property to the Plaintiff; that the second defendant and third defendant be liable for the costs relating to the re-transfer of the property; that the mortgage bond registered over the property by the second defendant be de-registered; that the second and third defendant sign all the documents and do all things necessary and incidental to the procurement of the re-transfer of the property; that the fourth defendant refunds the amount of R500,000 or any other amount paid to the fourth defendant by the second defendant in relation to the pictures by the second defendant of the property at the sale in execution; the order in terms of which the first defendant funds the second defendant all amounts, together with *mora* interest thereon *ex-tempore morae*, received by it from the second defendant in relation to the charges to procure a clearance certificate for the purpose of the transfer of the property and costs of suit only in the event of the action being defended.

[5] As an alternative to the main claim and in the event the Court refuses to grant the relief in the main claim, the plaintiff prays for an order of payment of damages sustained by the plaintiff in the sum of R 3,5 million as a result of the first, second, third, fourth and fifth defendants alleged negligence and cost of suit.

[6] The particulars of claim run to about 45 pages and consist of over 48 paragraphs of averments to sustain the claim. The averments of the particulars of claim will not be repeated in this judgment. Following the issue and service of the summons, the second defendant filed his plea and the fourth defendant filed notice in terms of Rule 23(1) during December 2013 which excepted to the particulars of claim as being vague and embarrassing, alternatively do not set out a cause of action against the fourth defendant.

[7] In response to the Rule 23(1) notice by the fourth defendant, the plaintiff filed a notice to amend its particulars of claim and duly filed the notice to that effect on 21 May 2014 and amended the particulars of claim during July 2014.

[8] Following the filing of the amended particulars of claim, the fourth defendant then filed notice in terms of Rule 23(1) in terms of which it withdrew the notice that was filed on 4 December 2013 and filed a fresh notice.

[9] In the new notice in terms of Rule 23(1), the fourth defendant complains that the plaintiff's amended particulars of claim do not disclose a cause of action, are vague and embarrassing, and/or do not comply with Rule 18.

[10] The grounds on which the defendant relies are as follow:

First cause of complaint

(10.1) It is alleged that at paragraph 14.20 that the first defendant failed to do what could reasonably be expected of a bank in the circumstances.

(10.2) It is then alleged that at paragraph 14.2 that, had the first to the fifth defendants done what could reasonably be expected of them (which is allegedly set out in paragraphs following paragraph 14.22), then the summons, judgment and the sale in execution or the “impending transfer” of the property would have come to the plaintiff's attention and the plaintiff would have been placed in a position to take appropriate steps to prevent the judgment and/or sale in execution and/or the transfer of the property.

(10.3) It is set at paragraph 15 that the first to the fifth defendants owed the plaintiff a duty of care to ensure proper service upon it of the summons and timeous notice of the notice of sale in execution and the “impending transfer ”.

(10.4) It is alleged at paragraph 33.2 that the fourth defendant owed a duty of care towards the plaintiff, on the basis of the banker/client relationship, to inform the plaintiff of the judgment, sale in execution and impending transfer of the property.

(10.5) It is then alleged at paragraph 33.1 that the first defendant acted negligently towards the plaintiff in that, notwithstanding the fact that the fourth defendant had a first bond registered over the property as security for his loan to the plaintiff, and notwithstanding the fact that the plaintiff complied with its obligations under the loan agreement, the first defendant allowed a further bond to be registered over the property in connection with the purchase of the property by the second defendant, without advising the plaintiff of the judgment, the sale in execution and the “impending transfer”, notwithstanding the fourth defendant’s knowledge thereof.

(10.6) Finally, it is alleged at paragraph 35 that as a result of the fourth defendant's aforesaid negligence, the plaintiff was unable to prevent the transfer of the property to the second defendant, which in turn is said to have led to the plaintiff suffering damages in the amount of R3,5 million.

(10.7) The fourth defendant contends that the plaintiff's case is bad in law for the following reasons:

(10.7.1) defects pleaded by the plaintiff do not give rise to a duty of care on the part of the fourth defendant to inform the plaintiff of the summons, judgment, sale in execution or transfer of the property;

(10.7.2) first there was no duty of care on the first defendant, the alleged failure to discharge the alleged duty of care was not negligent;

(10.7.3) In any event, the plaintiff has not pleaded any material facts on the basis of which the plaintiff could sustain a case of negligence against the fourth defendant.

(10.7.4) The fourth defendant then pleads as follows, that the plaintiff has failed to plead a sustainable conservation against it and prays that its first ground of exception be upheld with costs.

The second cause of complaint

[11] The plaintiff alleges at paragraph 33.2 that the fourth defendant owed a duty of care towards the plaintiff, on the basis of a banker /client

relationship, to inform the plaintiff of the judgment, sale in execution and impending transfer of the property.

[12] The plaintiff was required but it failed to plead without vagueness:

(12.1) The nature and origin of the bank/client relationship;

(12.2) Whether this relationship was governed by a written agreement and, if so, when and where the agreement was concluded and who represented the parties. In the event that the agreement (should it exist) was written, then, contrary to Rule18(6) of the Rules of Court, the plaintiff has failed to annex such written agreement;

(12.3) The terms of the banker/client relationship, particularly what duties, if any, the fourth defendant had in terms of the banker/client relationship;

(12.4) Whether its claim against the fourth defendant is a claim in contract or a claim in delict.

[13] Accordingly, the particulars of claim do not contain a clear and concise statement of the material facts upon which the plaintiff relies for relief. They are therefore vague and embarrassing and/or do not set out a cause against the fourth defendant and prays that its second ground of exception be upheld with costs.

Third cause of complaint

[14] The plaintiff seeks relief against the fourth defendant to refund R500 000. 00 or any other amount paid to the fourth defendant by the second defendant of the property at the sale in execution.

[15] No basis has been laid for the above relief. Nowhere has the plaintiff pleaded or pleaded with sufficient particularly (particularity) :

(15.1) that any monies were paid by the second defendant to the fourth defendant;

(15.2) any legally cognisable basis for such a “refund”.

[16] The particulars of claim accordingly do not disclose a case for the relief sought and/or vague and embarrassing and the fourth defendant would be embarrassed if required to plead to them.

[17] The fourth defendant contends that the particulars of claim do not disclose (omitted) the cause of action.

[18] The fourth defendant contends therefore that the particulars of claim do not disclose a cause of action, are alternatively vague and embarrassing, and/ or do not comply with rule 18. It contends furthermore that it would be prejudiced if required to plead to the particular of claim and that the third ground of exception be upheld with costs.

[19] The plaintiff opposed the exception application and raised the following grounds:

In Limine

(19.1) The fourth defendant delivered notice in terms of rule 23(1) on 05 August 2014;

(19.2) The first defendant delivered a notice of exception on 28 August 2014; and

(19.3) No procedural steps were taken from 28 August 2014 to 26 January 2022.

(19.4) It contends, therefore, that the application is prescribed, the fourth defendant having taken nearly eight years to take further steps in the proceedings and in consequence of which the exception has lapsed.

(19.5) The plaintiff contends therefore that the exception application be struck out and set aside as an irregular step in terms of rule 30(1).

Main Claim

[20] The plaintiff , states that in objection to the particulars of claim, the fourth defendant states that no basis is laid for this claim because the plaintiff has not pleaded or pleaded with sufficient particularity;

(20.1) that any monies were paid by the second defendant to the fourth defendant which might form the object of a refund; and

(20.2) any legally recognizable basis that would warrant refund of the monies that were paid.

[21] The plaintiff states that its case, as set out in the particulars of claim is that:-

(21.1) the second defendant purchased the property under public auction for R500 000.00;

(21.2) the fourth defendant was the bondholder and the title holder in respect of the property;

(21.3) the fourth defendant was notified by registered post by the third defendant of the sale as required in terms of rule 45;

(21.4) The particulars of claim state that the fourth defendant refunds the amount of R500 000 or any other amount paid to it by the second defendant in relation to the payment by the second defendant of the property at the sale in execution.

[22] The plaintiff then contends that if the fourth defendant did not receive the R500,000 or any other amount, it should simply plead as such, is this as these facts are particularly within the knowledge of the fourth defendant in any event.

[23] The plaintiff contends therefore that accordingly; the fourth defendant can plead to the particulars of claim as the extent is? a closer fiction which is neither vague nor embarrassing has been set out.

Damages Claim

[24] The plaintiff states that the fourth defendants objection to the particulars of claim is that they failed to disclose any cause of action, alternatively they are vague and embarrassing, further alternatively they are irregular in that the material facts pleaded:-

(24.1) do not give rise to any duty of care;

(24.2) thus the fourth defendant cannot have been negligent;

(24.3) the particulars of claim do not plead the facts needed to sustain

a case of negligence;

(24.4) the plaintiff fails to plead adequately or at all the nature and origin of the relationship that is set to give rise to the duty of care, the content of the fourth defendant's duties, whether the claim is delictual or contractual, or written or oral.

[25] The first issue for determination is whether the notice of exception is capable of lapsing and under what circumstances. The second issue is whether the grounds of exception are sustainable and whether the plaintiff, if the finding is made in favour of the plaintiff, the particulars of claim should be amended in so far as they relate to the fourth defendant.

In limine **- Inordinate delay of setting down the exception and reasons**

[26] Rule 23(1) of the Uniform Rules states that:-

"Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be,

> the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that —
>
> *(a)* where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and
> *(b)* the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph *(a)* is received, or within 15 days from which such reply is due, deliver the exception."

The rule clearly states that once the exception has been delivered, it **may** be set down for hearing within 15 days after delivery thereof. The use of the word **may** in the rule, is directory as opposed to peremptory.

[27] The exception is a pleading and not an application. In support of this principle, in Steve's Wrought Iron Works and Others v Nelson Mandela Metro[1], Goosen J summed it up as follows:

> "…Rule 23 prescribes the form of the exception as a pleading. An exception is not an application to which the provisions of rule 6 apply." It follows in my considered view that because the exception is a pleading as opposed to an application, it can

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1 2020 (3) SA 535 (ECP) at para [21]. See also the authorities cited therein.

therefore not lapse and the contention by the plaintiff that the exception has lapsed must fail.

[20] Furthermore, there was no bar to the plaintiff to set the exception down itself. It did not explain why this was not done and yes, although an inordinate time has elapsed since the exception was delivered, failure to set it down as expeditiously as possible cannot and should not render the exception to lapse as it is similar to any pleading in the matter.

Merits of the Exception

Main Claim and the alternative claim

[28] In Merb (Pty) Ltd v Matthews [2] the following useful summary of the some of the general principles applicable to exceptions is made by Maier-Frawley J :

"8. These were conveniently summarised by Makgoka J in Living Hands [3] as follows:

'Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

[2] Unreported, GJ case no 2020/15069 dated 16 November 2021. See also Du Toit NO v Steinhoff International Holdings (Pty) Limited [2020] 1 All SA 142 (WCC) at paragraphs [27]–[34]; Steinhoff International Holdings Proprietary Limited v Jooste (unreported, WCC case no 16919/2020 dated 27 October 2021) at paragraphs [21]–[28]; Abb South Africa (Pty) Ltd v Leago EPC (Pty) Ltd (unreported, GJ case no 22278/2019 dated 13 April 2022) at paragraphs [47]–[63]; University of The Free State v Christo Strydom Nutrition (CSN) In re: University of The Free State v Christo Strydom Nutrition (CSN) (unreported, FB case no 2433/2019 dated 18 July 2022) at paragraph [6]; Taitz Cellular (Pty) Ltd t/a Blue Cellular v Chadez Enterprises (Pty) Ltd (unreported, GJ case no 29643/2021 dated 3 August 2022) at paragraph 11; Venator Africa (Pty) Limited v Bekker [2022] 4 All SA 600 (KZP) at paragraph [31].

[3] Living Hands (Pty) Ltd v Ditz 2013 (2) SA 368 (GSJ) at 374G.

(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.' "

[29] An exception to a pleading on the ground that it is vague and embarrassing requires a two-fold consideration: (i) whether the pleading lacks particularity to the extent that it is vague; and (ii) whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced in the sense that he/she cannot plead or properly prepare for trial. The excipient must demonstrate that the pleading is ambiguous, meaningless, contradictory or capable of more than one meaning, to the

extent that it amounts to vagueness, which vagueness causes embarrassment to the excipient.'[4]

[30] An exception should be dealt with sensibly and not in an over-technical manner. [5] Thus, it is 'only if the court can conclude that it is impossible to recognize the claim, irrespective of the facts as they might emerge at the trial, that the exception can and should be upheld'.[6]

[31] If the exception is successful, the proper course for the court is to uphold it. When an exception is upheld, it is the pleading to which exception is taken which is destroyed. The remainder of the evidence does not crumble. [7] The upholding of an exception to a declaration or a combined summons does not, therefore, carry with it the dismissal of the summons or of the action.[8] The unsuccessful party may then apply for leave to amend his pleading. [9]

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[4] See Erasmus- Commentary on Rule 23(1).

[5] See Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 465H. See also Jake Trading CC v Rambore (Pty) Ltd t/a Rambore Specialist Contractors (unreported, WCC case no 11909/2017 dated 13 March 2019) at paragraph [32]; Bendrew Trading v Sihle Property Developers and Plant Hire (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [9]; Luke M Tembani v President of the Republic of South Africa (unreported, SCA case no 167/2021 dated 20 May 2022) at paragraph [14]; Altcoin Trader (Pty) Ltd v Basel (unreported, GJ case no 28739/2021 dated 12 September 2022) at paragraph [6]; Lovell v Lovell (unreported, GP case no 24583/2009 dated 22 September 2022) at paragraph [15].

[6] Luke M Tembani v President of the Republic of South Africa (unreported, SCA case no 167/2021 dated 20 May 2022) at paragraph [16]; Lovell v Lovell (unreported, GP case no 24583/2009 dated 22 September 2022) at paragraph [16]; Shopfitters Studio (Pty) v Ltd Dynamic Design Upholstery (Pty) Ltd (unreported, GP case no 27419/2021 dated 28 November 2022) at paragraph [10].

[7] Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1991 (3) SA 787 (T) at 791H; Princeps (Edms) Bpk v Van Heerden NO 1991 (3) SA 842 (T) at 845A–F. The contrary view taken in Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd 1991 (3) SA 795 (N) at 800F–801C was expressly rejected by the Appellate Division in Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993 (2) SA 593 (A) at 603C–D; Constantaras v BCE Foodservice Equipment (Pty) Ltd 2007 (6) SA 338 (SCA) at 348H–349A; Ocean Echo Properties 327 CC v Old Mutual Life Assurance Co (South Africa) Ltd 2018 (3) SA 405 (SCA) at 409C; Thipe v City of Tshwane Metropolitan Municipality (unreported, SCA case no 254/2019 dated 16 October 2020) at paragraph [23].

[8] Johannesburg Municipality v Kerr 1915 WLD 35 at 37; Berrange v Samuels II 1938 WLD 189 at 190; Santam Insurance Co Ltd v Manqele 1975 (1) SA 607 (D) at 610C; Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1991 (3) SA 787 (T) at 791H–I; Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993 (2) SA 593 (A) at 603C–H; Constantaras v BCE Foodservice Equipment (Pty) Ltd 2007 (6) SA 338 (SCA) at 348C–E; H v Fetal Assessment Centre 2015 (2) SA 193 (CC) at 219A–B.

[9] Santam Insurance Co Ltd v Manqele 1975 (1) SA 607 (D) at 610C; Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993 (2) SA 593 (A) at 602D–

[32] It is, in fact, the invariable practice of the courts, in cases where an exception has successfully been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time.[10]

[33] Leave to amend is often granted irrespective of whether or not at the hearing of the argument on exception the plaintiff applied for such leave. If the court does not grant leave to amend when making an order setting aside the pleading, the plaintiff is entitled to make application for such leave once judgment setting aside the pleading has been delivered.[11] If the unsuccessful party does not take any timeous steps, the excipient may take steps to bar him and apply to the court for absolution from the instance.[12]

[34] Where an exception is taken to particulars of claim in which two forms of relief are sought and where such particulars reveal a cause of action for one of the forms of relief but not for the other, the court may uphold the exception *pro tanto*.[13]

H; Constantaras v BCE Foodservice Equipment (Pty) Ltd 2007 (6) SA 338 (SCA) at 348C–E.

[10] Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993 (2) SA 593 (A) at 602D; Trope v South African Reserve Bank 1993 (3) SA 264 (A) at 269H; Rowe v Rowe 1997 (4) SA 160 (SCA) at 167G–I; Constantaras v BCE Foodservice Equipment (Pty) Ltd 2007 (6) SA 338 (SCA) at 348C–F; H v Fetal Assessment Centre 2015 (2) SA 193 (CC) at 219A–B; Baliso v FirstRand Bank Ltd t/a Wesbank 2017 (1) SA 292 (CC) at 302G; Ocean Echo Properties 327 CC v Old Mutual Life Assurance Co (South Africa) Ltd 2018 (3) SA 405 (SCA) at 409C–E; Thipe v City of Tshwane Metropolitan Municipality (unreported, SCA case no 254/2019 dated 16 October 2020) at paragraph [23]. For a case where an exception was upheld and the plaintiff's claim dismissed without leave to amend, see LM v DM 2021 (5) SA 607 (GP) at paragraph [50].

[11] Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993 (2) SA 593 (A) at 602E–H.

[12] Santam Insurance Co Ltd v Manqele 1975 (1) SA 607 (D) at 610E; Princeps (Edms) Bpk v Van Heerden NO 1991 (3) SA 842 (T) at 845D–F; Standard Bank of SA Ltd v Van Dyk 2016 (5) SA 510 (GP) at 511F–513B where it is pointed out that the contrary view in Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd 1991 (3) SA 795 (N), was effectively overruled in Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993 (2) SA 593 (A).

[13] Swadif (Pty) Ltd v Dyke NO 1978 (1) SA 928 (A) at 945H.

[35] If a pleading is bad in law, the answer is to except; [14] if it is vague and embarrassing, notice to cure may be given or further particulars (for purposes of trial) may be requested; and if the legal representative for a party has been genuinely taken by surprise by his opponent's reference to the cause of action in the opening address, he should take the opportunity to say so at the outset and object to the evidence if it does not accord with the pleadings. What a party cannot do, is to sit back, say nothing and then complain that the pleading is defective and that he was taken by surprise. [15]

[36] The test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows: [16]

(a) In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. If a statement is vague it is either meaningless or capable of more than one meaning. [17] To put it at its simplest: the reader must be unable to distil from the statement a clear, single meaning.[18]

(b) If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of. [19]

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[14] Trustee, Bus Industry Restructuring Fund v Break Through Investments CC 2008 (1) SA 67 (SCA) at paragraph [11]; Hill NO v Strauss (unreported, GJ case no 13523/2020 dated 2 July 2021) at paragraph [14]; Taitz Cellular (Pty) Ltd t/a Blue Cellular v Chadez Enterprises (Pty) Ltd (unreported, GJ case no 29643/2021 dated 3 August 2022) at paragraph 12).

[15] MN v AJ 2013 (3) SA 26 (WCC) at 33H and 35G–I; ETG Agro (Pty) Ltd v Varuna Eastern Cape (Pty) Ltd (unreported, ECG case no 5206/2016 dated 3 May 2021) at paragraph [6].

[16] See Lockhat v Minister of the Interior 1960 (3) SA 765 (D) at 777A–E; Quinlan v MacGregor 1960 (4) SA 383 (D) at 393F–H; Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 211B; Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd 2014 (2) SA 157 (GNP) at 166H–J.

[17] Leathern v Tredoux (1911) 32 NLR 346 at 348; Callender-Easby v Grahamstown Municipality 1981 (2) SA 810 (E) at 812H; Wilson v South African Railways and Harbours 1981 (3) SA 1016 (C) at 1018H; Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) at 644A–B.

[18] Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) at 644B.

[19] Quinlan v MacGregor 1960 (4) SA 383 (D) at 393E–H; Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 211B; ABSA Bank Ltd v Boksburg Transitional Local Council 1997 (2) SA 415 (W) at 421I–422A.

(c) In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he objects.[20] A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.

(d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced. [21]

(e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.[22]

(f) The excipient must make out his case for embarrassment by reference to the pleadings alone. [23]

(g) The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness.[24]

In International Tobacco Co of SA Ltd v Wollheim 1953 (2) SA 603 (A) at 613B and Lockhat v Minister of the Interior 1960 (3) SA 765 (D) at 777B it is said that it must be shown that the excipient will be 'substantially embarrassed' by the vagueness or lack of particularity.

[20] ABSA Bank Ltd v Boksburg Transitional Local Council 1997 (2) SA 415 (W) at 421J–422A; Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) at 645C–D; Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1) 2010 (1) SA 627 (C) at 630B.

[21] Quinlan v MacGregor 1960 (4) SA 383 (D) at 393G; Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298A; Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 211B; Francis v Sharp 2004 (3) SA 230 (C) at 240E–F; Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1) 2010 (1) SA 627 (C) at 630B; Bendrew Trading v Sihle Property Developers and Plant Hire (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [11]. Whether the excipient is prejudiced involves 'a factual enquiry and a question of degree, influenced by the nature of the allegations, their contents, the nature of the claim and the relationship between the parties' (Lovell v Lovell (unreported, GP case no 24583/2009 dated 22 September 2022) at paragraph [20] and the authorities there referred to).

[22] Kennedy v Steenkamp 1936 CPD 113 at 115; City of Cape Town v National Meat Supplies Ltd 1938 CPD 59 at 63; Amalgamated Footwear & Leather Industries v Jordan & Co Ltd 1948 (2) SA 891 (C) at 893; Lockhat v Minister of the Interior 1960 (3) SA 765 (D) at 777A; Kotsopoulos v Bilardi 1970 (2) SA 391 (C) at 395D–E; Callender-Easby v Grahamstown Municipality 1981 (2) SA 810 (E) at 813A; Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) at 645C–D; Eskom Holdings v Lesole Agencies CC (unreported, FB case no 2555/2016 dated 28 September 2017) at paragraph [7]; Barnard v De Klerk (unreported, ECPE case no 2015/2019 dated 22 October 2020) at paragraph [8]; Bendrew Trading v Sihle Property Developers and Plant Hire (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [12]; Kok v Botha (unreported, ECPE case no 1494/2020 dated 5 October 2021) at paragraph [13].

[23] Deane v Deane 1955 (3) SA 86 (N) at 87F; Lockhat v Minister of the Interior 1960 (3) SA 765 (D) at 777B.

[24] Francis v Sharp 2004 (3) SA 230 (C) at 240F–G; Eskom Holdings v Lesole Agencies CC (unreported, FB case no 2555/2016 dated 28 September 2017) at paragraph [7]; ETG Agro (Pty) Ltd v Varuna Eastern Cape

[37] A summons will be vague and embarrassing where it is not clear whether the plaintiff sues in contract or in delict, [25] or upon which of two possible delictual bases he sues,[26] or what the contract is on which he relies,[27] or whether he sues on a written contract or a subsequent oral contract, [28] or if it can be read in any one of a number of different ways,[29] or if there is more than one claim and the relief claimed in respect of each is not separately set out. [30]

[38] Although the introduction of irrelevant matter into a summons may make it vague and embarrassing, the pleading of irrelevant matter as history does not. [31] The summons is also vague and embarrassing if there is inconsistency amounting to contradiction between the allegations in a claim in reconvention and the plea in convention,[32] or between the summons and the documents relied upon as the basis of the claim;[33] or where the admission of one of two sets of contradictory allegations in the plaintiff's particulars of claim or declaration would destroy the plaintiff's cause of action; [34] or where a pleading contains averments which are contradictory and which are not pleaded in the alternative. [35]

(Pty) Ltd (unreported, ECG case no 5206/2016 dated 3 May 2021) at paragraph [5]; Bendrew Trading v Sihle Property Developers and Plant Hire (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [13].

[25] Brodovsky v Ackerman 1913 CPD 996; Wellworths Bazaars Ltd v Chandlers Ltd 1948 (3) SA 348 (W); Dunn and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968 (1) SA 209 (C); Gerber v Naude 1971 (3) SA 55 (T); Pocket Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd 1966 (4) SA 238 (R); Benteler South Africa (Pty) Ltd v Morris Material Handling SA (Pty) Ltd t/a Crane Aid (unreported, ECGq case no 3354/2021 dated 16 August 2022) at paragraph [15].

[26] Kock v Zeeman 1943 OPD 135.

[27] Luttig v Jacobs 1951 (4) SA 563 (O)

[28] Herbst v Smit 1929 TPD 306.

[29] General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd 1944 AD 444 at 454; Callender-Easby v Grahamstown Municipality 1981 (2) SA 810 (E) at 812H; Wilson v South African Railways and Harbours 1981 (3) SA 1016 (C) at 1018A; Benteler South Africa (Pty) Ltd v Morris Material Handling SA (Pty) Ltd t/a Crane Aid (unreported, ECGq case no 3354/2021 dated 16 August 2022) at paragraph [13].

[30] Kock v Zeeman 1943 OPD 135 at 139; Greyvenstein v Hattingh 1925 EDL 308.

[31] Du Plessis v Van Zyl 1931 CPD 439 at 442.

[32] Florence v Criticos 1954 (3) SA 392 (N)

[33] Keely v Heller 1904 TS 101; Naidu v Naidoo 1967 (2) SA 223 (N) at 226; in Small v Herbert 1914 CPD 273

[34] Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298J and 300G.

[35] Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 211E.

[39] In the instant matter, the plaintiff stated at the fourth defendant owed it a duty of care under the circumstances. It does not state what those circumstances are, whether they arise out of a contractual relationship or not . In fact, it fails to make reference to any contractual relationship. Accordingly, its particulars of claim are vague and embarrassing insofar as they related to the fourth defendant. Let me pause for a moment to assume that the fourth respondent was the mortgage bondholder at the time. Properties generally bonded to banks are sold as a matter of common commercial practice transferring attorneys usually require of the mortgage bondholders to provide cancellation figures for the purposes of issuing guarantees in favour of the mortgage bondholders.

[40] It is not expected of a mortgage bondholder to inquire as to the circumstances leading to the request for such cancellation figures. The cancellation figures could be emanating from a normal private sale between the owner of the property mortgaged and used as a security with the bank and a private purchaser or the sale could be as a result of a court order. The background leading to the sale of a property is not, as a practice, shared with the mortgage bondholder. In fact, the mortgage bondholder never, as a common commercial practice, second guesses the reasons for the disposal of such property bonded to it. I therefore hold the view that absent the basis upon which it is contended by the plaintiff that the bank owes a duty of care which is not supported by an averment in the particulars of claim that the duty is contractual, that the particulars of claim in so far as they related to the fourth defendant are vague and embarrassing and that the fourth defendant is entitled to except thereto. It follows in my view, that the exception should succeed on both the main and the alternative claims.

ORDER

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

(a) The fourth defendant's exception is upheld.

(b) The plaintiff is ordered to amend its particulars of claim in so far as they relate to the fourth respondent within 10 days of this judgment.

(c) The plaintiff is ordered to pay the costs.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **20 July 2023**.

DATE APPLICATION HEARD: 24 April 2023

DATE JUDGMENT HANDED DOWN: 20 July 2023

APPEARANCES

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Instructed by: Van Hulsteyns Attorneys