IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED

CASE NUMBER: 75672/16

DATE:7 December 2018

FARMISCO PROPRIETARY LIMITED Applicant

V

GERRIT COETZEE ATTORNEYS INCORPORATED Respondent

JUDGMENT

MABUSE J:

[1] Before this Court are an application for leave to amend and an exception to the particulars of claim as they stood before the amendments. If this Court grants the application for leave to amend, the exception falls to be dismissed but if the Court upholds the exception, it follows that the application for leave to amend should be refused. The application for leave to amend and the exception are heard together in the interest of time and convenience and in keeping with the case of Nxumalo v First Link Insurance Brokers (Pty) Ltd 2003 (2) SA 620 TPD where the Court held at page 623 A-B that:

"It is, however, necessary to restate the applicable legal principles in an application as present. Where a party opposes a proposed amendment on

the ground that if such amendment were to be granted, it would render the pleadings excipiable, both the application for amendment and the notice of objection based on the exception should be heard simultaneously."

[2] This is a claim by the Plaintiff against the defendant for the payment of money, R1,179,733.36in respect of the first claim and R510,000.00 in respect of the second claim.

[3] The Plaintiff, Farmisco (Pty) Ltd, is a private company with limited liability duly registered as such in terms of the company statutes of this country, with its principal place of business situated at Fourways Golf Park, Selbourne Building, 1016 Roos Street, Johannesburg, Gauteng Province. The Defendant, Gerrit Coetzee Attorneys Incorporated, is a private company with limited liability registered as such in terms of the company laws of this country, with its registered address situated at 1st Floor, Four Elements Building, 19 Palmiet Street, Potchefstroom in the Province of North West. The Defendant is a firm of attorneys.

[4] On 29 September 2016 the Plaintiff issued combined summons against the Defendant in which the Plaintiff claimed against the Defendant; payment of:

"4.1 a sum of R1, 179,733.36 in respect of the first claim, and

4.2 another sum of R510,000.00 in respect of the second claim."

Both the first and second claims are based on negligence. It is alleged by the Plaintiff, in respect of the second claim, that the Defendant, notwithstanding knowledge that the Plaintiff had become the true owner of shares and an investment of R590,000.00on 7 October 2013, proceeded to pay the sum of R510,000.00 being the proceeds of the shares to Yara South Africa, a wrong recipient.

[5] The Plaintiff's cause of action is predicated on the breach of mandate agreement entered into between the Plaintiff and the defendant. As pointed out earlier, the Defendant is a firm of attorneys. The Defendant

was appointed by the Plaintiff to perform certain juristic acts for and on behalf of the Plaintiff. The Plaintiff now claims that the Defendant was negligent in its performance of the tasks given to it by the Plaintiff as a consequence of which negligence it, the Plaintiff, suffered damages.

[6] I now turn to considering the Plaintiff's cause of action as contained in its notice of intention to amend. According to the heads of argument of Mr van Tonder, counsel for the Plaintiff, the Plaintiff has pleaded:

6.1 the agreement of mandate;

6.2 the breach of that mandate by the defendant;

6.3 the negligence of the defendant in the execution of the mandate.·

6.4 the damages, sustained by the plaintiff following the negligent performance of its mandate by the defendant; and,

6.5 that such damages were within the contemplation of the parties herein when the agreement of mandate was concluded.

[7] The Plaintiff's first claim relates to a matter in which the plaintiff had initiated legal action against IMF Air CC in which the Plaintiff had claimed recovery of certain fixed assets. It is alleged by the Plaintiff that the Defendant breached the said mandate agreement by, among others, failing to advise the Plaintiff of the contractual remedies available to it in accordance with the terms of the Sale Agreement between the Plaintiff, Yara South Africa (Pty) Ltd and Yara Nederland BV, on 22 October 2010.

[8] According to the said Sale Agreement, the business of Yara South Africa (Pty) Ltd was sold to the Plaintiff. This business included IMF Air CC's assets. Yara Nederland BV issued certain warranties in favour of the plaintiff. These warranties, included, *inter alia,* a warranty in terms of clause 16.7 of the Sale Agreement for damages amounting to R1,000,000.00. The Plaintiff claims that due to the Defendant's failure to advise it, the Plaintiff, of the relevant warranties issued by Yara Nederland BV in terms of the Sale Agreement, it, the Plaintiff, has suffered damages in the sum of R1,179,733.36, in respect of the first claim.

[9] The Plaintiff’s second claim emanates from the Defendant's failure to pay the proceeds of shares in Aquaharvest (Pty) Ltd. The defendant had received the proceeds of those shares following the liquidation of Aquaharvest (Pty) Ltd. These shares constituted part of the sundry receivables, sold in terms of the Sale Agreement. The Defendant had received the proceeds of such shares. Instead of paying the said proceeds to the Plaintiff, the Defendant paid them to the liquidators of Yara South Africa (Pty) Ltd. The proceeds of the sale were the sum of R510,000.00. Accordingly the Plaintiff sustained damages in the sum of R510,000.00.

[10] On 30 January 2018 the Defendant delivered a notice in terms of Rule 23(1) on the Plaintiff. In the said notice, the Defendant complained that the Plaintiff's particulars of claim in the first claim are vague and embarrassing in that the Sale Agreement does not list nor describe the assets allegedly sold by the Plaintiff. For that reason the Defendant complained that it was unable to plead to the allegations in paragraphs 11 and 13 inasmuch as they refer to, or rely on, the contents of the Agreement.

[11] In respect of the second claim, the Defendant complained, in its Rule 23(1) notice, that the Plaintiff's particulars of claim are vague and embarrassing in that the Defendant was unable to plead to the allegations in paragraphs 34 and 43 without being informed of the material allegations regarding the alleged mandate regarding the Aquaharvest shares on which the Plaintiff relies.

[12] In respect of both claims the Defendant demanded of the Plaintiff that it removes the said causes of complaint within 15 days of delivery of the notice in terms of Rule 23(1), failing which it would deliver an exception to the Plaintiff's pleading.

[13] On the very same date on which the Defendant delivered its notice in terms of Rule 23(1), and even before the period of 15 days set out in the said notice, being the period within which the Plaintiff was required to remove the Defendant's cause of complaint, the Defendant delivered its exception.

[14] On 19 February 2018, the Defendant delivered its second exception. On

16 April 2018, the Defendant delivered another notice in terms of Rule 23(1). Following the aforementioned exceptions, the Plaintiff delivered their notice of intention to amend on 19 May 2018. The Plaintiff's intention was to amend the particulars of claim by deleting the entire contents thereof and replacing them with completely new contents.

[15] On 23 May 2018 the Defendant served a copy of its notice of objection in terms of Rule 23(3) on the Plaintiff. The said objection was against the Plaintiff's particulars of claim and it was predicated on several grounds.

[16] Quite clearly the cornerstone of the Defendant's objection to the proposed amendment is that such proposed amendment, if granted, would render the Plaintiff's particulars of claim vague and embarrassing and accordingly excipiable.

[17] It is, however, necessary to restate the applicable principles in an application such as the current one. The onus is on the Defendant to establish the objection. See in this regard Colonial Industries Ltd v Provincial Insurance Co Ltd 1920 CPD 627, 629 in which the Court stated that:

':.. *safe in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make a very clear, strong case before he should be allowed to succeed* "

[18] The duty is on the excipient to prove that it will be prejudiced if the amendment is granted and secondly, that such prejudice cannot be compensated by an order of costs. See in this regard the following statement by Watermeyer J , as he then was, in Moolman v Estate Moolman & Another 1927 CPD 27 at 29. This statement has been accepted by our Court. It reflects the situation in our law:

"The question of amendment of pleadings has been considered in a number of English cases. See for example: Tildesley v Harper (10 ChD 393),· Steward v North Met Tramways Co (16 QBD 556) and the practical

rule adopted seems to be that amendments will always be allowed unless the application to amend is ma/a fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading it is sought to amend was filed."

[19] The Court, in **Levitan v New Haven Holiday Enterprises CC 1991(2) SA 297 C, 298** set the approach of the Courts as follows:
"It has been stated clearly and often, that an exception that a pleading is vague or embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged."

[20] In order to succeed with its exception to the particulars of claim or the contemplated particulars of claim, the Defendant must satisfy the Court that:

20.1 the Plaintiff's contemplated amendment of its particulars of claim is excipiable; it is not enough to complain that the contemplated amendment might be excipiable;

20.2 the excipiability of the particulars of claim is not merely arguable;

20.3 the excipiability of the contemplated amendment must not be capable of being cured by the furnishing of further particulars. Therefore if the defect in the formulation of the particulars of claim can be cured by the furnishing of further particulars the exception should not be allowed.

[21] According to the authorities, the test applicable based on vagueness and embarrassment arising out of lack of particularity can be summarised as follows:

21.1 In each case the Court is obliged to first of all consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or

capable of more than one meaning. The Court in Trope v South African Reserve Bank and Another 1992(3) SA 208 TPD, 211 A-0 had the following to say:

"An exception to a pleading on the ground that it is vague and embarrassing involves a twofold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced (Quinlan v McGregor 1960(4) SA 383 (D) at 3931E-H). As to whether there is prejudice. the ability of the excipients to produce an exception-proof plea is not only, nor indeed the most important test ... - see the remarks of Conradie J in Levitan v New Haven Holiday Enterprises CC 1991(2) SA 293 (C) at 298 G-H. If that were the only test, the object of pleading to enable the parties to come to trial prepare to meet each other's case and not be taken by surprise may well be defeated. "

Is it the Defendant's case: that the Plaintiff's particulars of claim are meaningless or ambiguous? Quite clearly no. The Defendant's major complaint against the Plaintiff's particulars of claim is that they lack particularity;

21.2 if there is vagueness in the sense set out in paragraph 21.1 supra, the Court is then obliged to undertake the quantitative analysis of such embarrassment as the excipient an show is caused to him by the vagueness complained of. See in this regard International Tobacco Co of SA ltd v Wollheim 1953(2) SA 603 A, 613 B;

21.3 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 form to which he objects. A point may be of utmost importance in one case and the omission thereof may give rise to vagueness and embarrassment but the same case may in another case be only a minor defect;

21.4 the ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced. In this regard see

Quinlan v McGregor *supra,* Levitan **v New** Haven Holiday Express *supra,*

21.5 the onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice;

21.6 the excipient must make out his case for embarrassment by reference to the pleadings alone.

[22] I now turn to the Plaintiff's particulars of claim. Rule 18(4) of the Uniform Rules of Court provides that:

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim .... With sufficient particularity to enable the opposite party to reply thereto. "

Rules of Court embody elementary principles of pleading. They do not set out in detail all the principles on which pleadings in a law suit are to be drawn. In Benson & Simpson v Robinson 1917 WLD 126, Wessels J, as he then was, explained the general principles of pleadings as follows:

"The Plaintiff must not set out the evidence upon which he relies, but he must state clearly and concisely on what facts he bases his claim and he must do so with such exactness that the Defendant will know the nature of the facts which are to be proved against him so that he may adequately meet him in court and tender evidence to disprove the Plaintiff's allegations. "

See also the lapidary of Lord Justice Cotton in **Spedding v Fitzpatrick 38 ChD at 410.**

[23] The Plaintiff must frame his particulars of claim in such a manner that the Defendant is able to know the case he has to meet. While it is accepted that the Plaintiff must draw his pleading carefully, and be well tuned out, the Court should not read such pleadings pedantically. The rules of Court do not require the Plaintiff to draw up the pleadings in a perfect language. It is enough if the allegations contained in the pleadings are clearly identifiable. A Court should not look at a pleading with a magnifying glass of too high power. See in this regard Purdon v Muller 1961(2) SA 211A,

which was decided before the amendment of the rules, in other words before the request for further particulars for the purposes of pleading was still part of the rules, the Court stated that:

"While it is fundamental that a party should be adequately apprised of the case he has to meet, the ingenious inquisitor should not be permitted, under the guise of a request for further particulars of a pleading, in effect to submit a series of interrogatories of the said party."

[24] As correctly pointed out by Mr Griessel, counsel for the Defendant, the Courts' powers to grant an amendment are only limited by considerations of prejudice. Prejudice in any case will lie in a litigant's inability to identify the witnesses to prepare for trial or to call at trial. Mr Griessel referred the Court to the case of De Klerk and Another v Du Plessis and others 1995(2) SA 40 **TPD,** 43. This was the case in which an application for amendment was opposed on the ground that the incorporated part of the plea would then be excipiable. The Court, as per Van Dijkhorst J, pointed out that an amendment which would render a pleading excipiable, should not be allowed and that whether this was in fact so was a matter of law which should be decided by the Court hearing the application for amendment.

[25] According to Mr Griessel, the test is not whether or not the Defendant is able to plead to the particulars of claim but whether it will be able to prepare for trial. He developed his argument that the clarity with regard to the particulars of claim should be done at the plea stage. In other words, the Defendant should be able, at the plea stage, to identify the witnesses it requires to call in support of its case. This objective can only be obtained if the Defendant knows the case it has to meet.

[26] According to him, the Defendant must, at the pleading stage, consult with its witnesses so that it can prepare a proper plea. He may be prejudiced if he pleads one thing instead of the other. Then he went about his argument to show what was lacking in the particulars of claim. The more he argued the more the Court became satisfied that, in fact what the Defendant required were further particulars. In my view, and here I agree with counsel for the Plaintiff, this instant case is a case in which the excipiability

of a pleading can be cured by the furnishing of further particulars. I am satisfied that the Plaintiff has pleaded its case properly; that the contemplated particulars of claim are not excipiable; that the objections raised by the Defendant can be a subject of a debate and finally that whatever complaints the Defendant has against the manner in which the Plaintiff has now rephrased its particulars of claim, may be sufficiently cured by the proper application of the provisions of Rule 21 of the Uniform Rules of Court. Rule 21 provides as follows:

"After the close of the pleadings any party may, not less than twenty days before trial, deliver a notice requesting such further particulars as are strictly necessary to enable him to prepare for trial. "

In conclusion:

1. The exception is dismissed with costs.
2. The Plaintiffs application to amend its particulars of claim is hereby granted.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:	*Adv. L van Tonder*
Instructed by:	*Baker & McKenzie*
Counsel for the Respondent:	*Adv. JS Griessel*
Instructed by:	*Savage Jooste & Adams Inc*
Date Heard:	*26 November2018*
Date of Judgment:	*7 December2018*