IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, LOCAL DIVISION, DURBAN

REPORTABLE

CASE NO: 1206/2016

In the matter between:

SHAWN PHARO **Plaintiff**

and

ALAN CRAIG FUTTER **First Defendant**

PIET GROVE **Second Defendant**

ORDER

(a) The exception is upheld.

(b) Paragraphs 19 and 31 and prayers 21.3 and 33.3 of the particulars of claim are struck out.

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

JUDGMENT

Delivered on: 20 March 2017

PLOOS VAN AMSTEL J

[1] This matter came before me by way of an exception to the plaintiff's particulars of claim. His claim is for confirmation of the cancellation of an agreement, restitution of a sum of R100 000 which he had paid pursuant to the agreement and damages in an amount of R1 846 695.

[2] It is averred in the particulars of claim that the parties concluded a written agreement in January 2011 in terms of which they would, as partners and under the name Alpi Oil, engage in the business of refining used oil for sale to an entity called Tribolube. The plaintiff would acquire a 20% interest in the partnership, for which he had to pay the defendants a sum of R225 000. An amount of R100 000 was payable on signature of the agreement and the balance over time, out of his share of the profits. The agreement provided that one third of the capacity of a certain plant would be given to the plaintiff for the purposes of resale.

[3] The case pleaded by the plaintiff is that the defendants made various representations to him, in particular relating to a machine which they said they had built, which was capable of cleaning and refining oil. He says he was induced by these representations to enter into the agreement and pursuant thereto he paid a sum of R100 000 to the defendants as a part payment towards his share in the partnership. He claims that these representations were false, that the machine was not capable of doing what had been represented to him, that the defendants knew their representations were false and that their intention was to make him part with his money. He accordingly cancelled the agreement and claims restitution of the R100 000 which he had paid. There is no difficulty with this claim and it is not the target of the exception which has been taken.

[4] The exception relates to a claim for loss of profits which the plaintiff says he would have made had the agreement been successfully implemented. He pleads that he would have received at least 10 000 litres of oil per month and over a period of forty seven months would have earned a profit of R940 000, plus a further sum of R906 695, representing 20% of the profit which the first defendant had represented to him the partnership would have earned over a period of five years. In the alternative he pleaded that the representations were made negligently.

[5] The first defendant gave the plaintiff a notice to remove the cause of the complaint, which was that the particulars were vague and embarrassing. The plaintiff was unmoved by the notice and the first defendant filed a notice of exception. The basis of it was that the particulars of claim relating to the damages claim were vague and embarrassing, alternatively that they lacked sufficient averments to sustain a cause of action. The excipient points out that the plaintiff cancelled the agreement on the basis of fraudulent, alternatively negligent, misrepresentations, and that his claim for damages is based in delict. It contends that the measure of his damages is to put him in the position he would have been in had the delict not been committed, not to put him in the position he would have been in had the misrepresentations been true.

[6] This is correct and in accordance with our law of delict.[1] If the misrepresentations had not been made the plaintiff would not have entered into the agreement. In that event he would not have earned any of the profits which he now seeks to claim.

[7] The case relied on by the plaintiff, *Transnet Ltd v Sechaba Photoscan (Pty) Ltd*[2] is distinguishable and of no assistance to him. The court held in that case that a claim for prospective loss of profits can be made as delictual damages. That is nothing new. Damages are regularly awarded for loss of future income in personal injury cases. The principle however is that the plaintiff has to be put in the position in which he would have been had the delict not been committed.

[8] In the *Transnet* case the court found that if the delict, which was fraud, had not been committed the plaintiff would have been awarded the tender, would have acquired the printing business which was the subject of the tender and would have made profits out of the business. In other words, in order to put it in the position it would have been in had the delict not been committed it was necessary to award it damages for loss of profits.

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[1] *Ranger v Wykerd and another* 1977 (2) SA 976 (A) at 987.
[2] *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA)

[9] That is not the case here. If the delict were not committed there would have been no contract and no profits. The claim for loss of prospective profits is therefore unsustainable.

[10] Counsel for the plaintiff however submitted that an exception is not the right procedure as the claim arises out of the same cause of action as the claim for R100 000 which is not covered by the exception. She referred to *Putco Ltd v Radio Guarantee Co (Pty) Ltd*[3] where Nicholas J said that an exception cannot validly be taken to a declaration on the ground that it does not support one of several claims arising out of one cause of action. The learned judge relied for this statement on *Dharumpal Transport (Pty) Ltd v Dharumpal*.[4]

[11] *Dharumpal* was decided before the Uniform Rules were promulgated. The rules which governed exceptions in this province at that time were rules 55 and 56 of Order XI of the Natal Rules of Court. Rule 55 provided for an exception where the pleading concerned contained averments not sufficient in law to sustain in whole or in part the action or defence, as the case may be. The plaintiff's claim was for the balance of the purchase price of a number of buses, tools and spares, plus interest. The defendant filed two exceptions, one in respect of the balance of the purchase price and the other in respect of the interest. Hoexter JA pointed out that both claims arose out of one cause of action, namely the breach of the sale agreement. He said that if the averments in the declaration were sufficient to sustain the claim for the balance of the purchase price, then, even if they were not sufficient to sustain the claim for interest, they were sufficient to sustain the claim *in part*. This was a reference to the wording of rule 55, namely '…not sufficient in law to sustain in whole or in part the action or defence…'. He added:[5]

> 'The excipient is not entitled to have the declaration set aside because it is not sufficient to sustain both the major and the minor claims in the action. That is nevertheless what the excipient asks the Court to do in his first exception. He excepts to the whole declaration on the ground that the averments therein do not sustain merely the minor claim. In my opinion such an exception cannot be countenanced in the face of the express words of rule 55'.

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[3] *Putco Ltd v Radio Guarantee Co (Pty) Ltd* 1984 (1) SA 443 (W) at 456.
[4] *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A).
[5] *Dharumpal* supra at 705C-D.

[12] At 706E Hoexter JA said:

> 'The main purpose of the exception that a declaration discloses no cause of action is to avoid the leading of unnecessary evidence. That purpose cannot be served by taking exception to a declaration on the ground that it does not support one of several claims arising out of one cause of action. In the present case, for instance, the upholding of the exception that the declaration does not support the minor claim would make no difference whatever to the evidence to be led at the trial.'

[13] Rule 23(1) of the Uniform Rules provides for an exception where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence. The words 'in whole or in part' do not appear in rule 23, and never did.

[14] *Dharumpal* was therefore decided on a rule with a different wording than the current rule 23. Further, upholding an exception on only one of the two claims would not have resulted in less evidence being required. In *Barclays National Bank Ltd v Thompson*[6] Van Heerden JA said, with reference to *Dharumpal*, that it has been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial. He also said that the function of a well-founded exception that a plea, or part thereof, does not disclose a defence to the plaintiff's cause of action is to dispose of the case in whole or in part. He said it is for this reason that exception cannot be taken to part of a plea unless it is self-contained, amounts to a separate defence, and can therefore be struck out without affecting the remainder of the plea.

[15] In *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd*,[7] a full bench decision, De Kock J said the remedy of an exception is available where the exception goes to the root of the opponent's claim or defence. If, for example, there is a point of law to be decided which will dispose of the case, in whole or in part, the proper course is to proceed by way of exception. In that case the exception was aimed at a part of the plea which concerned a claim for future loss of earnings. It was held that the issue raised by the exception was a separate and distinct one which should, if possible, be decided on exception despite the existence of other machinery, such as rule 33, by means whereof it could be decided. De Kock J

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[6] *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553 G-H.
[7] *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) SA 597 (C).

pointed out that, depending on which way the exception went in the case, evidence as to future loss of earnings would or would not be necessary at the trial.

[16] In the present matter there are two distinct claims in the particulars of claim. The first is for restitution of the payment of R100 000 by virtue of the cancellation of the agreement. The only evidence it requires relates to the validity of the cancellation. The second is for damages in the sum of R1 846 695 which the plaintiff says represent the profits he would have earned over a period of five years if the contract was fully and properly executed. Evidence will have to be led as to the likely performance and profitability of the business over a period of five years. I have already found that this is not a valid claim and the leading of evidence to support it will be a waste of time and money. The claim is bound to fail.

[17] In *Telematrix (Pty) Ltd v Advertising Standards Authority SA*[8] Harms JA said exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over – technical approach destroys their utility.

[18] I am satisfied that the damages claim is sufficiently distinct and separate from the claim for restitution to be susceptible to an exception. I do not see why the excipient should be put to the expense and time of dealing with the unsustainability of the claim as a separate issue in terms of rule 33.

[19] I make the following order:

(a) The exception is upheld.

(b) Paragraphs 19 and 31 and prayers 21.3 and 33.3 of the particulars of claim are struck out.

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

[8] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3.

Appearances:

For the Plaintiff	:	N Beket
Instructed by	:	Gishen-Gilchrist Inc c/o Northmore Montague Durban
For the 1st & 2nd Defendants	:	J Nicholson
Instructed by	:	Shepstone & Wylie Attorneys
Date Judgment Reserved	:	23 February 2017
Date of Judgment	:	20 March 2017