

Reportable:	YES / <b>NO</b>
Circulate to Judges:	YES / <b>NO</b>
Circulate to Magistrates:	YES / <b>NO</b>
Circulate to Regional Magistrates:	YES / <b>NO</b>



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION – MAHIKENG**

**CASE NO: 764/2022**

In the matter between:

**HENTIQ 1429 (PTY) LTD**

**PLAINTIFF**

**AND**

**T & J PRODUCTS (PTY) LTD**

**DEFENDANT**

Heard: **08 February 2024**

Delivered: The date for the hand-down is deemed to be on **8 March 2024**

**ORDER**

The following order is made:

1. The exception by the defendant is upheld.

2. The particulars of claim are struck out.
3. The plaintiff is ordered to pay the costs of the application.

## **JUDGMENT**

### **DJAJE DJP**

- [1] The plaintiff issued summons against the defendant for breach of an agreement wherein the plaintiff sold and delivered goods to the defendant at its request and instance. The amount claimed by the plaintiff in the summons is R726 313.18 (seven hundred and twenty-six thousand three hundred and thirteen rand eighteen cents). The defendant entered an appearance to defend. There was a notice of bar served and filed by the plaintiff as there was no plea forthcoming from the defendant. This was met with the first notice of exception by the defendant.
- [2] The cause of complaint by the defendant in the first notice of exception was that there was no compliance with Rule 41A of the Uniform Rules of Court. Second ground was that the claim was incomplete as the plaintiff had alleged that the agreement was concluded at Wesselsbron alternatively Mafikeng. The defendant alleged that the plaintiff should make an unequivocal averment of where the agreement was concluded. The third ground was the non-joinder of Astro Sugar Packers which company appeared on the invoices of the plaintiff attached to the declaration.

[3] The plaintiff in response filed a notice to amend as follows:

*“1. By deleting and substituting the content of paragraph 1 of the declaration with the following:*

*“1. The plaintiff is Hentiq 1429 (Pty) Ltd, registration number 1998/018359/07, a company duly registered and incorporated in terms of the laws of the Republic of South Africa with principal place of business situated at 9-34 PL Wesselsbron, Free State Province and which trades as Astro Sugar Packers.”*

*2. By deleting and substituting the content of paragraph 3 thereof with the following:*

*“3. During or about 2008 at Wesselsbron, the plaintiff and the defendant concluded an oral agreement.”*

[4] In addition the plaintiff filed a notice in terms of Rule 41A of the Uniform Rules of Court. No objection was received from the defendant. The amendment was effected. After the plaintiff filed another notice of bar, the defendant filed the second notice of exception as follows:

*“Lack of locus standi and non-joinder / misjoinder*

*1.1 Action was ostensibly instituted during April 2022 under case number 764/22 against Defendant by an entity described in the summons as (in relevant part):*

*HENTIQ 1429 (PTY) LTD, a company with limited liability registered in terms of the Companies Act and with its principal place of business situated at, 9-34 PL KOTZE STREET, WESSELSBRON, 9680*

*(Hereinafter called the plaintiff(s))*

1.2 Plaintiff is similarly cited in the headnote of the pleadings under case number 764/22.

1.3 In paragraph 1 of Plaintiff's amended "declaration" delivered 7 November 2022 the plaintiff is cited and described as (in relevant part):

*The plaintiff is Hentiq 1429 (Pty) Ltd.... which trades as Astro Sugar Packers.*

1.4 The entity allegedly known as Hentiq 1429 (Pty) Ltd t/a Astro Sugar Packers did not institute action against Defendant and no allegations are as to Astro Sugar Packers' authority to act as on behalf of Hentiq 1429 (Pty) Ltd as plaintiff in the action, or its agent, or when Hentiq 1429 (Pty) Ltd was substituted by Hentiq 1429 (Pty) Ltd t/a Astro Sugar Packers as plaintiff in the action.

3.5 In the result, the particulars of claim lacks the necessary averments to sustain the alleged cause of action, or any cause of action, and the very least Defendant will be embarrassed if expected to plead thereto.

Wherefore it is respectfully prayed that the objection be upheld and the plaintiff's action be dismissed, alternatively the particulars of claim be struck out with an appropriate punitive cost order in either event.

In the premises Defendants prays for an order in the following terms:

- (i) that any all of the exception as raised in paragraphs 1 above be upheld and plaintiff's claim be dismissed with costs alternatively that plaintiff's particulars of claim be struck out;
- (ii) that plaintiff be ordered to pay costs of the exception."

## **Submissions**

[5] It was argued that there is no *locus standi* and non-joinder in this action. The proceedings were instituted by Hentiq 1429 (Pty) Ltd

and now in the amended declaration the plaintiff is Hentiq 1429 (Pty) Ltd t/a Astro Sugar Packers. It therefore means that Hentiq 1429 (Pty) Ltd t/a Astro Sugar Packers did not institute action against the defendant or that Astro has the authority to act on behalf of Hentiq as plaintiff or that Hentiq (Pty) Ltd was substituted by Hentiq 1429 (Pty) Ltd t/s Astro Sugar Packers. As such the particulars of claim lacks the necessary averments to sustain a cause of action.

[6] The defendant argued that where it is apparent that the plaintiff lacks *locus standi* or there is a non-joinder , an exception can be raised rather than file a special plea. In support thereof reference to these cases was made, **Collin v Toffle 1944 AD 456-67; Anderson v Gordick Organisation 1960 (4) SA 244 (D); Anirudh v Samdei 1975 (2) SA 706 (N) at 708; Marney v Watson 1978 (4) SA 140 (C) at 146; Smit v Conelect 1987 (3) SA 689 at 691-693.**

[7] In contention the plaintiff argued that the description of the plaintiff is clear as the invoices attached to the particulars of claim show the name Hentiq 1429 (Pty) Ltd at the top and at the bottom states that the *'items supplied on this invoice remain the property of Hentiq until fully paid'*. It was contended that the defendant received the goods from Hentiq and no other entity. The plaintiff further argued that the defendant made payments in the amount of R109 009.27 to the plaintiff as an acknowledgment of indebtedness to the plaintiff.

- [8] In addition the plaintiff submitted that the cause of action has been detailed with sufficient particularity to enable the defendant to plead. On that basis the exception stands to be dismissed.
- [9] The court in **Colonial Industries Ltd v Provincial Insurance Co Ltd 1920 CPD 627** at 630 stated as follows in relation to exception that: *“Now the form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed: its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings: it also serves as a means of taking objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing.”*
- [10] The onus rests on the excipient to show that the particulars of claim disclose no cause of action. **See: Amalgamated Footwear & Leather Industries v Jordan & Co Ltd 1948 (2) SA 891 (C).**
- [11] The issue in this matter is that the plaintiff lacks *locus standi* for non-joinder and misjoinder which renders the particulars of claim not to disclose a cause of action.
- [12] It has been stated in our law that joint owners must act jointly- none may act alone. **See Smith v Conelect 1987(3) SA 689 (W).** At 691E-F Van Niekerk J went on to say that: “ See *Rahim v Mahomed 1955 (3) SA 144 (D)* at 147B-E where Henochsberg AJ, in considering the necessity of joining co-owners, joint contractors and joint partners litigating, held that: ‘ *The rule is that in such cases the other co-owner, joint contractor ,*

*partner or interested party is a necessary party and should be joined in the proceedings, unless the Court is satisfied that he has waived his right to be joined'.*

*The excipient, it was alleged, faces severe prejudice if OEN is not joined since*

*(a) any judgment granted against the plaintiff is not res judicata against OEN;  
and*

*(b) the excipient cannot bring any counterclaim that it may have against the plaintiff and OEN.”*

[13] As stated by the defendant above, the court in **Collin v Toffle 1944 AD 456**, settled that the objections of non-joinder may be raised by exception.

[14] In this matter the plaintiff as the party instituting the action is described differently in the particulars of claim from the party cited on the face of the summons. There was no allegation made to join Astro Sugar Packers or allege that there was a substitution of the parties. This raises the issue of *locus standi*. In civil proceedings the party instituting an action has the duty to allege *locus standi*. The importance of *locus standi* was dealt with in **Tullip Diamonds FZE v Minister of Justice and Constitutional Development and Others 2013 (10) BCLR 1180 CC** as follows:

*“Standing is an important element in determining whether a matter is properly before court”.*

[15] The plaintiff herein should be in a position to know its name and use it correctly in litigation proceedings. The purported plaintiff herein lacks *locus standi* to prosecute the action against the defendant as it is apparent *ex facie* the particulars of claim that the incorrect party has been cited. The exception stands to be upheld as the particulars of claim clearly do not disclose a cause of action against the defendant.

### **Costs**

[15] The awarding of costs is in the discretion of the court and in my view, there is no reason why a cost order should not be made against the plaintiff.

### **Order**

[16] Consequently, I make the following order:

1. The exception by the defendant is upheld.
2. The particulars of claim are struck out.
3. The plaintiff is ordered to pay the costs of the application.

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**J T DJAJE**



**DEPUTY JUDGE PRESIDENT  
NORTH WEST HIGH COURT DIVISION, MAHIKENG**

**APPEARANCES**

**DATE OF HEARING : 08 FEBRUARY 2024**

**JUDGMENT RESERVED : 08 FEBRUARY 2024**

**DATE OF JUDGMENT : 08 MARCH 2024**

**COUNSEL FOR THE PLAINTIFF : ADV P SMIT**

**COUNSEL FOR THE DEFENDANT : ADV D SMIT**