FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH-AFRICA

Case no. 4121/2009

In the matter between:

AFGRI BEDRYFS BEPERK	Plaintiff
and	
MERWEDE BOERDERY BK	First defendant
KARLIEN DIéALEBOUT	Second defendant
FREDERIK JACOBUS VAN DER MERWE	Third defendant
BARLOWORLD AGRICULTURE SA **(a division of BARLOWORLD SA (Pty) Ltd)**	Fourth defendant

HEARD ON:	5 NOVEMBER 2010
JUDGMENT BY:	MURRAY, AJ
DATE OF JUDGMENT:	23 DECEMBER 2010

1] To be decided in the instant case is an exception against a counterclaim.

2] First to Third Defendants ("Merwede") instituted the said counterclaim against Fourth Defendant ("Barloworld") and Plaintiff ("Afgri"). Barloworld excepted to the counterclaim.

3] Merwede in 2004 bought a new Massey Ferguson tractor "voetstoots" from Afgri in terms of an instalment sales agreement (the "First Agreement") which excluded Afgri, as dealer, from any liability for latent defects and prohibited Merwede from cancelling the agreement and withholding any payments in case of any unhappiness with the tractor.

4] Merwede alleged that the tractor was delivered with numerous mechanical defects which could not be repaired while the manufacturer's warranty (the "First Warranty") was still valid and was therefore unfit for the purpose for which it was bought.

5] When Merwede tried to cancel the agreement, it was invited for discussions with Afgri and Barloworld, as manufacturer/distributor. The said discussions led to the conclusion of the "Second Agreement" between the three parties upon which the counterclaim is based.

6] The Second Agreement, set out in annexures “C” and “D” to the counterclaim, entailed that Barloworld would repair the tractor and issue Merwede with a new one year warranty (superseding the “First Warranty”) with subsequent repairs up to R20 000.00 or three years, whichever came first while Afgri agreed to extend Merwede’s repayment schedule on the tractor to August 2010. Its terms therefore amended the First Agreement between Afgri and Merwede.

7] Despite numerous attempts to have the tractor repaired, the problems allegedly continued, however, to such a degree that Merwede cancelled the contract and returned the tractor to Afgri in 2008.

8] Afgri then issued summons against Merwede, demanding full payment of R703 008,41 in terms of the First Agreement. At Merwede’s instance Barloworld was joined as Fourth Defendant.

9] Merwede then instituted a counterclaim against Afgri and Barloworld based on the breach of the Second Agreement.

From Afgri it claimed damages for crop losses due to the continuous problems with the tractor and from Barloworld claimed the amount which Afgri claimed from Merwede.

10]Barloworld on **22 June 2010** gave Merwede notice in terms of Uniform Court Rules 23(1), 30, 18(4) and 18(12), respectively, to rectify various objections against the said counterclaim.

11]Thereafter Barloworld "excepted" against the counterclaim as lacking the necessary averments to constitute a cause of action against Barloworld and/or as being vague and embarrassing.

12]In what Mr van Rhyn aptly refers to as a "shotgun approach" Barloworld attempted to show, without filing a Rule 30 application:

12.1 That the counterclaim is vague and embarrassing, or if that does not succeed

12.2 that it lacks averments to sustain a cause of action, or

if that does not succeed

12.3 that it contains irrelevant allegations that should be struck out, or if that does not work

12.4 that it constitutes an irregular step and should be set aside in total.

13]In arguing the matter for the excipient, Mr Ploos van Amstel, for instance, relied on **ROBERTS CONSTRUCTION COMPANY LTD v DOMINIOM EARTH WORKS (PTY) LTD, 1968 (3) SA 255 (AD)** at **262 B** in which it is stated that:

"A plaintiff is certainly not entitled to plead a jumble of facts and force a defendant to sort them judiciously and fit them together in an attempt to determine the real basis of the claim ….. If such a defendant, in terms of rule 18(6), requests the plaintiff to give full particulars of the contract, and plaintiff fails to do so, the defendant is entitled to except to the plaintiff's pleading as being vague and embarrassing, and the exception should be allowed"

and further argued that par. 4 contains *facta probantia* and irrelevant allegations and that paragraphs 4.6, 4.8, 4.9, 4.10, 4.11, 4.14, 4.15, 4.16, and 4.17 should therefore be struck out.

14]Of necessity in a counterclaim flowing from certain prior events, as *in casu*, the events giving rise to the counterclaim itself will need to be set out in the said counterclaim as background information, as was done in par. 4 of the counterclaim. Such background information does not form part of the *facta probanda* needed to establish the counterclaim, and therefore need not be stated in enough particularity for the defendant to plead to.

15]As pointed out by Mr van Rhyn, with reference to the contents of the said par. 4, the counterclaim is aimed at both Afgri and Barloworld and the facts regarding Afgri (with whom the First Agreement was concluded) have to be pleaded as well, otherwise Afgri will except.

16]As he correctly stated, certain averments in a pleading may

serve as background information without their being relied on for the cause of action, and without their therefore forming part of the *facta probanda*. (See: **VORSTER v HERSELMAN, 1982 (4) SA 857 (O)** at **861 A-F**; as well as **FRANCIS v SHARP AND OTHERS, 2004 (3) SA 230 (C)**).

17]When it is averred that a pleading lacks averments which can sustain a cause of action, the excipient has to show that the pleading is excipiable on every interpretation which can reasonably be connected therewith, as stated in **KOTH PROPERTY CONSULTANTS CC v LEPELLE / NKUMPI LOCAL MUNICIPALITY LTD, 2006 (2) SA 25 (T) at 30 E – 31 A** and **32 A-E.** As stated at **28,** the pleading is excipiable only if no possible evidence led on the pleading can disclose a cause of action**.**

18]Rule 18(4) requires only that:

"Every pleading shall contain a clear and concise statement as to the material facts upon which the pleader relies (my underlining – HM) *for his claim....with sufficient particularity to enable the opposite party to reply thereto".*

19]What a defendant needs to reply to, is the material averments regarding the cause of action, i.e. the *facta probanda*, in other words the essential factual averments needed to establish such a cause of action.

20]As stated in **JOWELL v BRAMWELL-JONES AND OTHERS, 1998 (1) SA 836 (W**) the Plaintiff *"is required to furnish an outline of its case. That does not mean that the defendant is entitled to a framework like a cross-word puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and may possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements."*

21]A counterclaim is a separate pleading, therefore the same requirements apply to it.

22]In **Jowell,** *supra,* at **903A – B,** it was clearly stated that "a distinction must be drawn between the *facta probanda*, (which are the facts which the Defendant must plead on – HM)... and the *facta probantia"*, which are the secondary

allegations that the Plaintiff will rely on in court (and will prove by way of evidence) to prove the primary factual allegations which are essential to establish the cause of action.

23]*Facta probantia* do not belong in the particulars of claim. They do not form part of the essential averments which defendant is required to meet in his plea. He can therefore not insist on their being provided in the particulars of claim and can only obtain them, after having filed his plea, by way of a request for discovery or a request for further particulars for trial.

24]Regarding the allegation of the counterclaim being vague and embarrassing, he argued that there were at least eight agreements mentioned in the counterclaim and that it was impossible to determine which agreements Merwede relied on for the alleged breach of contract.

25]That would only be the case, however, if paragraphs are read in isolation, which appears to be what the ‘excipient’ attempts to do.

26]It is trite law that pleadings must be read as a whole. In other words, allegations in paragraphs must be read in the context of a pleading as a whole. An objection to a pleading as being vague and embarrassing must therefore go to the root of the cause of action. The onus is on the excipient to prove not only vagueness which leads to embarrassment, but also embarrassment which leads to prejudice. (See: **NEL AND OTHERS N.N.O. v McARTHUR AND OTHERS, 2003 (4) SA 142 (T)**).

27]The excipient's main problem in this 'exception' is his failure to consider the relevant paragraphs in context, to adequately distinguish between background information and *facta probanda* and between *facta probanda* and *facta probantia* and to insist on facts which should be obtained by way of a request for further particulars for trial or a request for discovery.

The First "Complaint":

28]The first complaint is aimed at the First Warranty mentioned

in par. 4.8 of the counterclaim and at the lack of specific detail regarding the said warranty.

29]Had Merwede indeed relied on breach of that warranty for its counterclaim, the complaint would have been valid. But read in its proper context with par. 7, it is obvious that par. 4.8 merely provides background information for the Second Agreement breach of which forms the basis of the counterclaim. Detailed information regarding the First Warranty need therefore not be provided to establish the cause of action in the counterclaim as averred.

30]But as Mr van Rhyn submitted, a non-contracting party can also make a misrepresentation to one of the contracting parties which could lead to cancellation of the contract as is indeed alleged in paragraph 4.14.1 (See: **CHRISTIE, THE LAW OF CONTRACT IN SOUTH AFRICA) 5th edition)**

31]The first complaint was **also** directed at the *ex lege*/tacit/implied warranty referred to in par. 4.8. Mr Ploos van Amstel argued with reference to Rule 18(6) and

to **MOOSA AND OTHERS N.N.O. v HASSAM AND OTHERS N.N.O., 2010 (2) SA 410 (KZP)** and the unpublished judgment **IGI v BUTHELEZI** that Merwede would have "no case" if the warranty is not annexed to the counterclaim in the absence of condonation for such failure since it constitutes a contract and must therefore be annexed.

32]The counterclaim does not rely on that warranty, however. It does not form part of the *facta probanda* for its cause of action so there is no need to annex a copy thereof. In the instant circumstances the argument is therefore not applicable.

33]The existence or not of the alleged *ex lege* warranty referred to in par. 4.8 and objected to in the First Exception, is something to be proved with legal argument at the trial and is not an issue to be decided at the exception stage. All the excipient needs to do is to deny paragraph 4.8 in his plea to the counterclaim.

34]Read in context, it is clear that the breach of contract relied

on in paragraphs 10 and 11 follow from the breach of the Second Agreement. I am satisfied that the *facta probanda* to establish a breach of the Second Agreement and therefore the cause of action of the counterclaim are set out with sufficient particularity to enable Barloworld to know what case it has to meet and to plead thereto.

35]The First complaint therefore fails.

The Second "Complaint":

36]Par. 4.9 also deals with background information. As stated above, the counterclaim is based on the breach of the Second Agreement which incorporates the explicit one year warranty provided by Barloworld which replaced the First Warranty.

37]Details about the "First warranty" therefore do not form part of the *facta probanda* which Merwede needs to supply in the counterclaim.

38]The second complaint about the reference to the *ex lege*

warranty in par. 4.8 fails for the same reasons as those set out with reference to the “first complaint”.

39]The Second Complaint is therefore dismissed.

The Third “Complaint”:

40]The Third Complaint is also directed at background information.

41]It is trite law that the truth of the facts alleged in a pleading against which an exception is filed, has to be accepted for purposes of the exception. If Merwede therefore avers that the Second Agreement amended the terms of the First Agreement and the First Warranty, the truth of such averment has to be accepted for purposes of this complaint.

42]There is therefore no merit in the Third Complaint and it is dismissed.

The Fourth “Complaint”:

43]The counterclaim is based on the breach of the Second Agreement.

44]The excipient is not entitled to all the detail alleged to be missing and must obtain the said detail by means of a request for further particulars for trial purposes or a request for discovery.

45]The Fourth Complaint therefore fails as well.

The Fifth "Complaint":

46]The Firfth Complaint avers that details of the various problems with the tractor need to be supplied.

47]However, all Merwede needed to aver was that the tractor remained defective. The details of all the attempted repairs do not form part of the *facta probanda* and need not be supplied in the counterclaim but can be supplied by evidence or further particulars for trial purposes.

48]The allegation that paragraphs 9 and 10 lack averments

necessary to sustain the counterclaim or are vague and embarrassing is therefore unfounded.

49]The Fifth Complaint is therefore dismissed.

The Sixth "Complaint":

50]The documents forming the Second Agreement are annexed to the Counterclaim. They are properly signed by the authorised legal representatives who acted on behalf of the parties. That would constitute compliance with the non-variation clause in the First Agreement.

51]Par. 5.2 provides the names of parties' representatives who concluded the Second Agreement and avers that they were duly authorised to do so.

52]The detail averred in the Sixth Complaint to be lacking, refer to *facta probantia* which would have to be requested by way of a request for further particulars.

53]The Sixth Complaint therefore lacks merit and is dismissed.

The Seventh "Complaint":

54]It is obvious from the context that the Counterclaim is based on breach of the Second Agreement.

55]The complaint that it is not clear on the breach of what contract the counterclaim is based, is without any merit.

56]The detail alleged to be lacking in paragraph 12 furthermore pertain to *facta probantia* which need not be pleaded in the particulars of claim.

57]It was correctly conceded that sufficient detail has been pleaded for the two defendants in reconvention to be able to assess their damages.

58]The Seventh Complaint therefore lacks merit, too, and is dismissed.

59]Wherefore the following order is made:

24.1 Fourth Defendant's exceptions are dismissed.

24.2 Fourth Defendant is ordered to pay the costs of the exception.

_____

H. MURRAY, AJ

FOR THE APPLICANT:	Adv C Ploos van Amstel SC
Instructed by:	McIntyre & Van der Post, BLOEMFONTEIN
For the 1st, 2nd & 3rd DEFENDANTS:	Adv. AJR Van Rhyn SC
Instructed by:	EG Cooper Majiedt Inc, BLOEMFONTEIN