




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 33048/2019

<u>DELETE WHICH IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
24/07/2020	
Date	Signature

In the matter between:

ANDREW MICHAEL COBB

PLAINTIFF

And

BARLOWORLD SOUTH AFRICA (PTY) LTD

DEFENDANT

JUDGMENT: EXCEPTION

VUKEYA AJ

INTRODUCTION AND BACKGROUND

- [1] The defendant notes an exception to the plaintiff's particulars of claim and alleges that they are vague and embarrassing or that they lack the necessary averments to sustain a cause of action. The plaintiff defended its particulars of claim and opposed the exception.
- [2] In a nutshell, the plaintiff entered into a Contract of Employment with the defendant on or about 24 September 2014 in which it was agreed that he would be employed by the defendant in Botswana as a Groups Parts Manager for thirty six (36) months starting from 01 November 2014 up to and including 31 October 2017.
- [3] According to the plaintiff one of the terms of the contract was that he was entitled to join the Barloworld Medical Aid Scheme in South Africa and that monthly contributions to the scheme would be borne equally between the plaintiff and the defendant.
- [4] When the Plaintiff became permanently disabled on 30 September 2015 he was placed on medical retirement and he alleges that it was subject to the rules of the fund and that he received a gross salary of P56 307.00 and a car allowance of P17 476.00 per month from the defendant.

The particulars of claim

- [5] In his particulars of claim the plaintiff avers that as an employee of the defendant he became a member of the defendant's Disability Benefit Fund of which the insurer is Momentum. It is also his version that he and the defendant contributed to such a fund and therefore they are bound by its rules.
- [6] The terms of the fund as pleaded by the plaintiff in his particulars of claim are as follows:

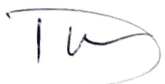
- 6.1. *The defendant is to pay the plaintiff his remuneration in full for six consecutive months following the date of his disablement;*
- 6.2. *Over the next 24 months, following the six months period referred to above the defendant is to make payments to the plaintiff of a disability benefit equal to 90% of the plaintiff's remuneration;*
- 6.3. *After the 24 months referred to above and until termination of the defendant's obligations under the rules of the fund, the defendant is to make payment to the plaintiff of a disability benefit equal to 75% of the plaintiff's remuneration;*
- 6.4. *Both the plaintiff and the defendant have to continue contributing towards the fund whilst the plaintiff endures his disablement.*

- [7] The plaintiff's version is that the defendant made the payments as listed in Column "I" of Annexure "B" of his particulars of claim instead of making payments as listed in Column "H" of the same annexure. He therefore demands from the defendant a total amount of R899 112.98 plus interests which according to the plaintiff, the defendant refuses to pay.

Grounds of exception

- [8] The defendant noted the following two grounds of exception to the plaintiff's particulars of claim on the basis that the particulars of claim are vague and embarrassing or that they lack the necessary averments to sustain a cause of action:

- [8.1] *although the claim is directed to Momentum, the plaintiff has sued the defendant without joining Momentum (non-joinder).* The bases of the defendant's exception is that the plaintiff, in his particulars of claim, pleads that as an employee of the defendant he became a member of the defendant's disability benefit fund of which the insurer is



Momentum and that the defendant failed to pay him in accordance with the terms or the rules of the fund. Even though the plaintiff pleads that the defendant is bound by the rules of the fund and the payment terms in the event of a disability of a member of a fund, the plaintiff has failed to cite the owner of the fund, namely, Momentum as a party to the proceedings.

The defendant argues that Momentum has a direct and substantial interest in the subject matter of the action and may be affected tremendously by the judgment of the court, if granted; and therefore submits that the plaintiff ought to have joined Momentum as the second defendant in the proceedings but failed to do so.

[8.2] *Although the plaintiff makes reference to a policy with Momentum (which he refers to as the fund), no such policy or schedule has been attached to the particulars of claim as required in terms of Rule 18(6) of the Uniform Rules of Court.* The defendant's second ground of exception is based on the fact that the plaintiff references in his particulars of claim "Momentum's Disability Benefit Policy" and further submits that he has complied with all obligations in terms of the policy but fails to annex the policy referenced in the particulars of claim to enable the defendant to consider it and plead to it.

[9] The plaintiff's defence to the first ground of exception is that the defendant, as the member of the fund, carries the obligation of making the payment to the plaintiff in the event of the plaintiff's disablement and that the payments received by the plaintiff soon after his disablement were made by the defendant. Furthermore, according to the plaintiff, the insurer (Momentum) has no obligation towards the plaintiff and Momentum has no interest in the matter.

[10] Regarding the second ground of exception the plaintiff states that the specific terms upon which the claim is founded were pleaded in detail and that it was indicated to the defendant that the plaintiff was not in possession of the

document containing the terms of the fund. To the best of his knowledge the original or the copy of the document was in the possession of the defendant.

Principles relating to pleadings and exceptions

- [11] As a starting point, a consideration of what is required of pleadings is necessary when dealing with exceptions. Rule 18 (4) requires that each pleading in an action...

“shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto”

- [12] The above rule refers to two important aspects of pleadings and requires that the pleading should contain:

- (a) A clear and concise statement;
- (b) Material facts upon which the pleader relies for his claim and such facts must contain sufficient particularity to enable the opposite party to reply thereto. This requirement relates to the core and substance of a pleading. It does not necessarily mean that the pleader must disclose every piece of evidence necessary to prove such fact but every material fact which is necessary to be proved. Facts which only serve to establish the cause of action are regarded as material facts and such facts should be related with sufficient particularity and clarity.

- [13] In *Trope v SA Reserve Bank* 1992 (3) SA 208 (T) at 210G – 211H, McCreath J emphasized the significance and requirements of rule 18 (4) by commenting as follows:

“It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead

thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4). At 264 the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18 (12)) amounts to an irregular step, a greater degree of particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading. The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18 (4) and the principles laid down in our existing case law”

[14] Where a party notes an exception to the pleadings, it is important to be mindful of the general principles relating to exceptions on the basis that a pleading is vague and embarrassing. A summary of these principles appears in **Erasmus, Superior Court Practice** at B1 154 to B1 154A as follows:

- (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. Where a statement is vague it is either meaningless or capable of more than one meaning.
- (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 or her by the vagueness complained of.
- (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 or she is compelled to plead to the pleading in the form to which he or she objects. 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.
- (e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.
- (f) The excipient must make out his or her case for embarrassment by reference to the pleadings alone.
- (g) An exception must relate to the whole of the cause of action or claim and not to a particular paragraph in the cause of action.

[15] What can be deducted from the above principles regarding exceptions is that an excipient must clearly and concisely state the grounds upon which he takes the exception. It therefore follows that in order to succeed; an excipient has the duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, that no cause of action is disclosed, failing this, the exception ought not to be upheld.

Submissions and the analysis

[16] The defendant's submissions are that although the plaintiff pleads that upon becoming an employee of the defendant he became a member of the defendant's disability benefit fund; he does not make reference to any specific clause in the contract of employment which entitles him to the benefit claimed. He however, refers to clause 10 of the contract of employment which only

entitles him to join the Barloworld Medical Aid scheme in SA. According to the defendant, a medical aid scheme relates to medical aid insurance and not to disability insurance.

- [17] In emphasizing the test for deciding whether particulars of claim were vague and embarrassing because of lack of particularity, Adv Nadeem Alli, for the defendant, referred the court to the case of *Lockhart v Minister of Interior* 1960 (3) SA 765 (D) at 777; *Leathern v Tredoux* (1911) 32 NLR 346 at 348 and *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393G. From the above cases the test can be summarised as follows:

- 17.1. The court is obliged to consider whether the pleading indeed lacks particularity to an extent that it can be said to be vague or capable of more than one meaning;
- 17.2. The court must also make a ruling as to whether the embarrassment is so serious as to cause prejudice to the excipient if compelled to plead to the pleading in the form to which he objects.
- 17.3. It should be determined whether the excipient will be prejudiced if the exception is not upheld.

- [18] Counsel for the defendant therefore argues that by failing to join Momentum to the proceedings, while the plaintiff relied on certain terms of the fund (Momentum Disability fund); it renders the plaintiff's particulars of claim insufficient to sustain a cause of action because it is bald, sketchy and incapable of enabling the excipient, with sufficient information, to establish the case it has to meet. The annexure relied upon as Annexure "A" does not support the allegations made regarding the excipient's liability to the plaintiff and is therefore vague and embarrassing to the extent that it is deficient for want of the necessary allegations to sustain a cause of action against the excipient.

- [19] In answer, Adv Jan Lubbe for the plaintiff submits that the plaintiff does not rely on the employment contract for his claim but alleges that by virtue of him being the employee of the defendant he is entitled to claim the disability fund. Furthermore, Counsel for the plaintiff argues that the payments received by the plaintiff post his disablement were made by the defendant, not by Momentum and that the short payments equate to a breach by the defendant of its obligations. He argued that the situation would have been different had the defendant not made such payments after the disablement of the plaintiff.
- [20] Adv Lubbe submitted further that should the exception be dismissed there will be no prejudice on the defendant because he may still file a special plea or deny any liability for the payment of the plaintiff's disability remuneration. Regarding the second ground of exception Adv Lubbe submits that the defendant should have acted in accordance with Rule 30 upon realisation that the plaintiff has failed to annex a copy of the contract or document upon which his claim is based, but the defendant failed to do so. According to Counsel for the plaintiff, the plaintiff incorporated the terms of the contract in paragraph 11 of its particulars of claim and therefore there is no merit on the second ground of exception and it stands to be dismissed. He however conceded that the plaintiff should have included in his particulars why he could not attach the contract.
- [21] It is common cause that the plaintiff was an employee of the defendant and that he contributed to the Medical Aid Scheme of the defendant. Clause 10 of the contract of employment states that "the employee is able to join the Barloworld Medical Aid scheme in SA. The contribution to the medical aid is borne equally by the employer and employee". It can be noted from this particular clause in the contract that reference is only made to a medical aid scheme and not a disability fund.
- [22] The plaintiff's ground of defence to the first exception is that he does not rely on the contract of employment with the defendant to claim from the disability fund but alleges that as an employee of the defendant he became a member of the defendant's disability benefit fund and that entitles him to the benefits in

terms of the "fund". This is vague. When one looks at the particulars of claim of the plaintiff, it is easy to come to the conclusion that he relies, amongst others, on his contract of employment for his claim. Although the plaintiff made submissions to indicate that he does not rely on his contract of employment for the claim, my understanding is that he alleges that "by virtue of his employment by the defendant he is entitled to claim from the fund". The cause of action does not appear clearly from the factual allegations made by the plaintiff. What binds the plaintiff to the defendant is the contract of employment; it is the link between the two. The contract of employment is clear about the medical aid scheme and silent on any disability benefits that the plaintiff is entitled to claim from.

[23] In my view the plaintiff's particulars of claim lack particularity to an extent that they amount to vagueness. It is not clear from the contents of the pleadings whether the plaintiff intends to sue the defendant or Momentum considering that he also alleges that he was making a contribution towards the Disability Benefit fund held by Momentum.

[24] In his particulars of claim in Paragraph 12 the plaintiff states that: "*the plaintiff has complied with all his obligations in terms of the Employment Contract as well as the Momentum's Disability Benefit Policy*", this statement is indicative of the fact that the plaintiff does in a way rely on the Employment Contract to claim from the fund. Even if the intention is to claim from the defendant alone as it seems to be the case in this matter, Momentum has an interest in the matter as they are the institution allegedly holding the funds on behalf of the defendant and the plaintiff who were allegedly making contributions. I therefore find that the non-joinder of Momentum and the lack of particularity in the particulars of claim of the plaintiff create a vagueness which is prejudicial to the defendant. In my view, the defendant has succeeded to prove that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed.

[25] This brings me to the second ground of exception, namely, that the contract or document containing the particular terms pleaded by the plaintiff in his

particulars of claim was not attached as provided by Rule 18 (6). The provisions of Rule 18 (6) are that *"a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading"*. The plaintiff referred the court to the terms of the alleged contract existing between him the defendant and/or Momentum without attaching a true copy of the alleged contract or a copy of the relevant Paragraph 11. If the plaintiff places reliance on such a document, he has a duty to attach it in terms of Rule 18 (6), and alternatively, in the absence of any such document; the plaintiff must state why such a document could not be filed. The plaintiff had to wait for the defendant to take exception before explaining that he was not in possession of such a document and that to the best of his knowledge it is in the defendant's possession.

[26] When a party relies on a contract to prove its claim, that contract becomes a link in the chain of his cause of action, and in the absence of that link there is no connection between the two. The plaintiff has submitted that he does not rely on the contract of employment for his claim, it can therefore be deducted that the document upon which the plaintiff's claim is based is that which contains the terms of the fund as referred to in Par 11 of the plaintiff's particulars of claim. In my view failure to attach a true copy of the contract upon which the claim is based creates a disconnection between the claim and the cause of action and renders the particulars of claim to lack the necessary averment to sustain the claim. If the plaintiff's claim is based on the terms as pleaded in the particulars of claim, the document containing such claim is the best way to prove the content of the evidence and the plaintiff should have at least attached a copy of such a document.

[27] I am of the view that the particulars of claim fail to disclose a cause of action for the relief claimed and therefore compelling the defendant to plead thereto will prejudice him in his defence.

[28] In the premise, I make the following order:

1. The first and second grounds of exception are upheld, with costs.
2. The particulars of claim are struck out;
3. The plaintiff is granted leave to amend its particulars of claim within 21 days from date hereof.



VUKEYA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION - JOHANNESBURG

Heard: 28 July 2020

Delivered: 21 August 2020

Appearances:

For the Plaintiff/Respondent: Adv J Lubbe

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