

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO:67056/2018

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

30/05/2019  
DATE

SIGNATURE

In the matter between -

**CORNELIUS CRONJE BURGER**

Plaintiff

and

**SUGENTHIREN JOHN NAIR**

First Defendant

**RIAAN BREDEKAMP**

Second Defendant

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**JUDGMENT**

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STRYDOM AJ

[1] This is an exception raised against the plaintiff's particulars of claim.

[2] The plaintiff sued the defendants jointly and severally, the one paying the other

to be absolved for an amount of R700 000 plus interest. The plaintiff based his claim on contract and in, the alternative, on unjust enrichment.

- [3] When an exception was raised against the contractual claim, the plaintiff by way of notice withdrew this claim. The second defendant then pleaded to the alternative claim. The first defendant then raised a further exception against the alternative claim.
- [4] Three grounds of exception were raised, each of which relate to the plaintiff's claim for enrichment against first defendant. The second defendant pleaded to the claim.
- [5] The plaintiff raised a point *in limine* that the exception was delivered out of time. The plaintiff did not pursue this point.
- [6] The first defendant raised three causes of complaint. Paragraph 10 of the alternative claim reads as follows:
- "In the alternative to the plaintiff's main claim and only if it is found that no binding and/or enforceable contract came into being, then and in that event only, plaintiff claims from first and second defendants jointly and severally as stated infra."*
- [7] According to this paragraph, the plaintiff's claim is still rendered conditional upon a finding whether or not the contract which was the subject matter of the main claim is unenforceable or not. It was then argued that paragraph 12 of the particulars of claim is in conflict with this paragraph, rendering the pleading vague and embarrassing, as it is stated:

*"In the bona fide belief that the contract was valid and enforceable in all respects ..."*

- [8] This quoted portion implies that the contract was not valid and enforceable in all respects. This is in conflict with paragraph 10 to the extent that paragraph 10 still leaves the question open whether the contract was enforceable or not.
- [9] I am of the view that this contradiction is occasioned by the changed circumstances, i.e. the withdrawal of the main contractual claim. After the withdrawal of the contractual claim the claim for unjust enrichment is based on the unenforceability of the contract. I am further of the view that the plaintiff should have amended paragraph 10 by alleging that the contract was unenforceable for whatever reason. This would have tidied-up the particulars of claim after the withdrawal of the main claim.
- [10] It was argued on behalf of the excipient that if the first defendant for instance plea to paragraph 10 that the contract was in fact enforceable it will render the entire further enrichment claim meritless. I do not agree with this argument as the plaintiff can then in reply challenge this plea by alleging that the contract is in fact unenforceable. A legal dispute would thus be raised which will then be determined as part of the action on the alternative claim.
- [11] As stated there exists some confusion if paragraph 10 and paragraph 12 of the particulars of claim are compared. I am of the view however that in light of the withdrawal of the main claim the excipient is not prejudiced by this vagueness. If the pleading is considered in its totality it becomes clear that the plaintiff's claim is based on unjust enrichment on the basis that the contract was invalid



and unenforceable. The first defendant cannot be embarrassed, let alone prejudiced, by the contents of paragraph 10 read with paragraph 12.

[12] The other two causes of complaint raised by the excipient relate to annexure B to the particulars of claim. The plaintiff alleges that it made payment or caused payment to be made in the amount of R700 000 to the defendants, jointly and severally, on 2 November 2015 by way of an electronic funds transfer into the nominated bank account of the first and second defendants. In confirmation of this the plaintiff then annexed a document marked "B".

[13] If the document is considered, it purports to be a printout on the letterhead of Standard Bank addressed to Johann. It reads that it confirms that the following payment has been made into an account from Johann. The beneficiary's name is SJ Nair. The amount is R700 000 and the beneficiary reference is M Coetzee. It was argued when this document is considered in conjunction with the contents of paragraph 12, it is in conflict with the allegations contained in this paragraph in two ways. First, the payment was made to SJ Nair, the first defendant, and not to the first and second defendants jointly and severally. It was accordingly argued that it renders the pleading vague and embarrassing as it is unclear whether the two defendants were enriched by receiving an undue payment.

[14] Second, as the plaintiff averred that he either made the payment or caused the payment to be made, it is unclear whether the plaintiff was impoverished by making of the payment.

[15] These arguments in my view have no merit. It was specifically stated in

paragraph 12 that electronic funds transfer was made into the nominated bank account of the first and second defendants. This can be interpreted that the account of the first defendant was the nominated account. If there is uncertainty in regard to an intention, an excipient cannot avail himself unless he shows that upon any construction of the pleadings the claim is excipiable.<sup>1</sup>

[16] For the same reason the other complaint is also meritless. The plaintiff alleged that he made the payment or caused the payment to be made. The “cause payment to be made” part can only be interpreted to mean that the payment was made on behalf of the plaintiff. The reference to “cause payment to be made” is in line with annexure B which refers to Johann and not to the plaintiff. The fact is the plaintiff also alleges that he made the payment and in my view it would be a matter for evidence to explain why annexure B refers to Johann as the party that made the payment. If Johann made the payment on behalf of the plaintiff, it will require evidence to explain why the plaintiff alleges that he made the payment and accordingly was impoverished by making the undue payment.

[17] It was further argued on behalf of the excipient that the plaintiff should have pleaded what the underlying *condictio* for the unjust enrichment was. This point raised was not part of the exception and the excipient cannot raise further grounds for exception not mentioned in its notice of exception.

[18] An excipient is obliged to confine its complaint to the stated grounds of his exception.<sup>2</sup>

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<sup>1</sup> Amalgamated Footwear and Leather Industries v Jordan & Co Ltd 1948(2) SA 891(C) at 893

<sup>2</sup> Cotas v Williams 1947 (2) SA 1154 (T); Wicksteed v George 1961 (1) SA 651 (FC)

[19] I am of the view that the plaintiff made all the necessary allegations to sustain a cause of action based on unjust enrichment. These allegations are not vague and embarrassing to the extent that the first defendant would not be able to plead thereto. To the extent that there is a limited uncertainty between the contents of paragraph 10 read with paragraph 12, this does not prejudice the first defendant. Accordingly the exception is dismissed with costs.

Date heard: 21 May 2019

Date delivered: 31 May 2019 at 10h00

Counsel for plaintiff / respondent: Adv G. F. Heyns

Counsel for defendant / excipient: Adv J. M. Hoffman