

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 34497/2020

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 13/06/2023

SIGNATURE:

**FORD MOTOR COMPANY OF SOUTH AFRICA
(MANUFACTURING) (PTY) LTD**

Applicant / Excipient / Plaintiff

AND

OMEGA RISK SOLUTIONS (PTY)LTD

Defendant

This judgment was handed down electronically by circulation to the Parties/Legal Representatives by email and uploaded to the electronic file of this matter on Caselines. The date and time for handing down of this judgment is deemed to be the 13 June 2023 at 10h00

JUDGMENT

MAKAMU AJ:

INTRODUCTION

[1] This is an opposed exception brought by the Plaintiff, Ford Motor Company (Manufacturing) of Southern Africa (Pty) Ltd, against the pleadings and counterclaim of the Defendant Omega Risk Solutions (Pty) Ltd.

[2] The Plaintiff in the main action and the Defendant in the main action as they will be referred to entered into an agreement, marked POC 3, Plaintiff represented by Pamela Xaba-Samuel and Defendant represented by J A Ockert on the 16 October 2018, in terms of which defendant would provide security service at the manufacturing plant of the Plaintiff. The contract was signed and subsequent to that an addendum to the contract marked POC 2 was also signed. They named the contracts in this matter as POC1 in main, two addendums POC 2 and POC 3 were signed.

There was a risk assessment to be conducted by the Defendant and be submitted to the Plaintiff and amongst the findings were that the Plaintiff should provide biometric access to the premises or provide card system to enable access to the company and that the grass near the main office should be cut to a shorter height.

[3] There is no real issue in this matter about the contracts themselves, however in POC 2 and 3 there is a clause which states that a purchase order will be issued every twelve months which will detail the amount to be invoiced by the Defendant. The invoice will be submitted at the beginning of every month with compliance to all the requirements of the purchase order. I am not going to delve into the details of their agreement, rather I will refer only to the clause in respect of the purchase order which was to be issued once every twelve months. POC 2 clause 7, states: "The Service Provider will be entitled to fees as set out in the Purchase Order". POC 3 clause 9 (a) stipulates as follows: "Payment terms will be as specified in the relevant Purchase Order".

[4] There was a security breach at the Plaintiff's plant by people dressed in the Defendant's uniform and held the security at gun point and stole approximately eleven vehicles. The Plaintiff was offended by this and decided to sue the Defendant for the loss, Prior to the suit, the Defendant issued an invoice which was paid, minus certain amount to off set part of the amount towards recovery of the loss suffered for the stolen vehicles.

[5] The Plaintiff issued summons against the Defendant on 31 July 2020, the Defendant pleaded to the summons and lodged a counterclaim against the Plaintiff. The Plaintiff raised an exception in regard to the plea of the Defendant's plea and its counterclaim, where the Defendant stated that they issued invoice and simply mentioned purchase order in the invoice and did not attach Purchase Order. One may simply say it is in terms of Rule 30 of the Uniform rules and the counterclaim.

LEGAL PRINCIPLES AND THE LAW ON EXCEPTION

[6] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) states that exception provides to weed out cases without legal merit.

[7] In the case of *Naidoo and Another v Dube Transport Corp & others* 2022 (3) SA 390 (SCA); It was reaffirmed that the Court must accept the factual averments in the particulars of claim as truthful, unless manifestly false and cannot go beyond the pleadings.

[8] When an exception is taken, the Court must look at the pleadings excepted to, as it stands. See *Salzmann v Holmes* 1914 AD 152. *Minister of Safety and Security v Hamilton* 2001 (3) SA (SCA).

[9] No facts outside those stated in the pleading can be brought into issue, except in the case of inconsistency. *Cassims Estate v Bayat and Jadwat* 1930 (2) PH F81 (N). *Soma v Maruane* NO 1975 (3) SA 53 (T) states that no reference may be made to any other document. *Johnson v Leal* 1980 (3) SA 927 (A). *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A). *Dilworth v Reichard* 2002 (4) All SA 677 (W).

[10] An exception should be dealt with in a sensible and not over-technical manner. *Telematrix* above. In *Trope v South African Reserve Bank and another* 1992 (3) SA 208 (T). McCreath J dealt with an exception on the ground that a pleading is vague and embarrassing as follows: -

“An exception to a pleading on the ground that it is vague and embarrassing involve a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. Quilan v MacGregor 1960 (4) SA 383 (D)”.

The Plaintiff avers that they cannot be able to plead to the counter claim without knowing if the purchase order exists for the period of the invoice issued by the Defendant, and that the invoice is in accordance with the terms of the relevant Purchase order.

[11] Rule 30 refers to irregular proceedings, as such the Plaintiff argues that the pleadings of the Defendant amount to irregular proceedings as the purchase order was not attached to the plea. Rule 30(1); provides “A party to a cause in which an irregular step has been taken by any other party may apply to court to set aside that step”. It is for this reason that the Plaintiff brought the application.

[12] As to whether there is prejudice; the ability of the excipient to pronounce an exception not only, or indeed the most important test-see the remarks of Conradie J in *Leritan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C)* and the authorities there cited.

EVALUATION

[13] The Defendant’s counterclaim is based on the issued invoice and Plaintiff says they could not plead in the absence of the Purchase order as it stipulates the terms on which the amount should be invoiced. It is argued that the matter cannot go beyond the pleadings as the alleged Purchase Order which is a spine of the invoice was not attached to the invoice or the particulars of claim. The Defendant did not attach the Purchase order which is the basis of the invoice, in order for one to be satisfied that the invoice is due and payable one need to go outside the pleaded documents which is being challenged by the Plaintiff.

[15] The operation of Rule 30 and exception are identical in nature, similarly the same applies to an exception to a counterclaim. The Plaintiff’s complaint is that the

Defendant's counterclaim is irregular for lack of compliance with Rule 18(6). The contention further is that it lacks averments necessary to sustain a cause of action or on that the counterclaim is vague and embarrassing. In *ABSA Bank Ltd v Boksburg Transitional Local Council (Government of the Republic of South Africa)* 1997 (2) SA 415 (W) the Court said the following:

"If there is vagueness which justifies an exception, the exception is sound whether or not the court rule was breached, if, on the other hand, such vagueness is lacking, the exception should fail even when the party is entitled to attack the pleading as an irregular proceeding because of non-compliance with the Court Rules. That is distinct complaint requiring different adjudication."

[16] The Court may elect to ignore the irregularity in a Rule 30, as long as it does not result in any substantial prejudice to the other party as stated in *SA Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd* 1977 (3) SA 703 (D). The plea is expiable when it does not disclose a defence and the allegations in the counterclaim states only that the counterclaim is vague and embarrassing.

[17] The Plaintiff argued that the plea does not disclose a defence, as the tacit terms contended for cannot be imported as a principle of law. In the matter of *Vermeulen v Goose Valley Investment (Pty) Ltd*, court said;

"It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it can be shown that ex-facie the allegations made by the plaintiff in any other document upon which his cause of action may be based, the claim is bad in law."

[18] The plaintiff argued that the purchase order is imported as tacit terms of the contract and in *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A);

"Before it can imply a tacit term the court must be satisfied, upon consideration in a reasonable and business-like manner of the terms of the contract and the

admissible evidence surrounding circumstances, that an implication necessary arises that the parties intended to contract on the basis of the suggested term.”

[19] A consideration of the recent case of *University of Johannesburg v Auckland Park Theological Seminary and Another* by the Constitutional Court and the matter of *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investment* [2021] 3 All SA 647 (SCA), 2022 (1) SA 100 (SCA) where both courts stated that a court is enjoined to consider all extrinsic evidence before determining what to exclude and on that basis the exception must fail. Both Courts have held that the expansive approach should be adopted in respect of the admissibility of extrinsic evidence, regardless of whether the words used in the contract are ambiguous.

[20] The Plaintiff contends that the Defendant did not attach the purchase order which is the basis to the issuing of the invoice together with the invoice or as part of the particulars of claim. Whereas the Defendant referred to the purchase order in his invoice which would need someone to look elsewhere to be satisfied that the invoice is issued properly and it is due and payable as claimed in the counterclaim. The purchase order is not part of the contract but one needs to have the purchase order or at least refer to it when submitting an invoice, as such it cannot be said that it is part of the contract which is missing from the counterclaim or plea.

[21] The fact that the Plaintiff paid some part of the amount as pleaded and deducted what it deemed not to be due to the Defendant amounts to an acknowledgement that the Defendant was entitled to issue an invoice and to be paid, this aspect can be ventilated during the trial. When the Plaintiff honoured the invoice and deducted some of the money to offset what they believed the Defendant owed them, they accepted the invoice without the purchase order attached.

[22] The Plaintiff also contends that the counterclaim has no basis as the purchase order is not attached to the documents, only the invoice is attached which refers to the purchase order. This does not make the Plaintiff fail to reply to the Defendant's plea or to plead to the counterclaim.

[23] The Plaintiff dispute the fact that there is a purchase order as the Defendant failed to attach it to their papers. This is a matter of evidence to be led during trial and to except at this stage of the proceedings. The plaintiff may make a demand in terms if Rule 35(12) and 35(14) in order to remedy the omission. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd* 1984 (2) All SA 366 (A) a principle which became known as Plascon Evans Rule, was established which stated that; “When factual dispute arise, therefore, relief should be granted only if the facts stated by the respondent, together with the admitted facts in the applicant’s affidavit, justify the order.”

[24] I find that the purchase order does not form part of the written contract that the parties entered into. Whether or not some form part of the written contract is an issue to be decided during trial but it does not make the plea of the defendant and counterclaim expiable. The Plaintiff needed the pleadings to be struck out due to lack or particularity, however, the plaintiff may be able to plead or to employ Rule 35(12) and 35(14) as stated earlier.

CONCLUSION

[25] After considering all the facts and submissions made, I am satisfied that there is no merit to this exception.

[26] I therefore make the following order.

Order: The exception by plaintiff against the pleadings and counterclaim of the defendant is dismissed with costs.

M.S MAKAMU
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

APPEARANCES

For the Applicant

Trevor Ohannessiah SC
With Muhammed Cajee

Instructed by

Biccari Bollo Mariano Inc

Tel: 011 622 3622

Email: angelo@bbmlaw.co.za

For the second Respondent

Luke Choate

Instructed by

Webber Wentzel Attorneys

Tel: 011 530 5376 / 5578

Email: caroline.theodosiou@webberwentzel.com

erwyn.durman@webberwentzel.com

THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON
13 JUNE 2023.