

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 7694/2020P

In the matter between:

TONGAAT HULETT SUGAR SOUTH AFRICA LIMITED

Plaintiff

and

NQABOMZI MAYOLA

First Defendant

DEETEE TRANSPORT (PTY) LTD

Second Defendant

DAVID THULANI SIBEKO

Third Defendant

YALI PHINDUGCOBE JOYI

Fourth Defendant

JUDGMENT

BEZUIDENHOUT J:

[1] Plaintiff instituted an action against the four Defendants. First Defendant thereafter raised twelve grounds of exception to the particulars of claim. These

exceptions were heard by Mngadi J. who upheld some of the exceptions and dismissed the others. Prior to the matter being heard by Mngadi J. Plaintiff made certain amendments to the particulars of claim and it was then held by Mngadi J. that the amended particulars of claim addressed the grounds of exception raised in the first, second, third, fourth, fifth, sixth, tenth and twelfth grounds of exception and dismissed them accordingly.

[2] What remained were the grounds raised in respect of the seventh, eighth, ninth and eleventh grounds of exception. The seventh ground related to the failure to attach invoices to the particulars of claim. The eighth ground related to the failure to furnish details of the alleged payments procured rendering the pleadings vague and embarrassing. Mngadi J. also found that the ninth ground and eleventh ground were justified, were vague and embarrassing and accordingly those exceptions were upheld with costs.

[3] After the judgment of Mngadi J. Plaintiff filed a notice of intention to amend its particulars of claim and the particulars of claim were amended on 6 December 2021. This was firstly by deletion of the existing paragraph 12A and substituting it with the following 12A “attached marked B1 to B218 are the invoices reflected in paragraph 12 of the particulars of claim”. Secondly by the insertion of a new paragraph numbered 13B and which reads “13B attached hereto are 13B.1 marked C2 of the authorisations extracted from Plaintiffs SAP system, 13B.2A marked D1 a copy of a letter from Rand Merchant Bank dated 3 December 2021 confirming the amounts paid by Plaintiff to Second Defendant as per the spread sheet attached D1, 13B.2B marked D2 the first spread sheet referred to in D1 as an amount deposited and 13D.2C marked E3 the second spread sheet referred to in D1 as reference”.

[4] It was submitted by Mr. Gumbi on behalf of the excipient that the exceptions in respect of the previous grounds of exception relating to grounds 8, 9 and 11 are still pursued as they do not comply with rule 18. This is as per the notice of exception dated 4 February 2022. It was submitted that the contract must be attached to the

particulars of claim and the bank statements were not attached and that the action should be therefore be dismissed with costs.

[5] It was submitted that Plaintiff's action is based on fraud allegedly committed by First Defendant and that paragraph 17 of the particulars of claim states "The second, third and fourth defendants accepted payments from the plaintiff knowing that same were not due and payable and that the second defendant had an entitlement to same." It was further contended that the intention to defraud or misappropriate the money was not dealt with and there was insufficient particularity for First Defendant to plead. It was submitted that the requirements for fraud or misrepresentations was not set out in the particulars of claim. The attaching of the invoices as annexures B1 to B218 and spreadsheets of the payment of the invoices to Second Defendant as per annexures D1 to D3 does not cure the defects in the particulars of claim and that it therefore remains vague and embarrassing. It is therefore contended that Plaintiff's particulars of claim dated 6 December 2021 was still vague and embarrassing. First Defendant did not pursue the seventh ground of exception.

[6] Plaintiff has submitted that it is expressly pleaded in the particulars of claim that First Defendant authorised the payments in circumstances where those payments were not due and where First Defendant knew that they were not due as no services had been rendered. It was submitted therefore that there was nothing further that could be provided besides the invoices from which it was apparent that they were generated by First Defendant. The payments were made to Second Defendant and it is alleged that no work or function was done by Second Defendant to have entitled it to such payment and that First and Second Defendant were well aware that no work was done and that no payments were therefore due.

[7] The exception accordingly only relates to the amended particulars of claim and the excipient cannot except against the whole particulars of claim again as the majority of the exceptions were dismissed by Mngadi J.

[8] The eighth exception was, in my view, cured after the ruling of Mngadi J. in that the documents which are attached as B1 to B218 and D1 to D3 and to which I have referred to above clearly indicate which payments were made, when they were made, to whom they were made and it is specifically pleaded that there was no contract and that there was no agreement for such transportation and that no services were rendered. The particulars of claim is therefore not vague and embarrassing in that regard and it is possible for First Defendant to plead thereto. The ninth ground of exception is also covered by the said documents as the same applies to it as in respect of the eighth ground of exception. The eleventh ground also, in my view, was cured by the said documents as they clearly indicate when and to whom such payments were made. It is confirmed by the bank that these payments were made and accordingly there is clear indication to First Defendant what the allegations by Plaintiff are and accordingly there is sufficient for First Defendant to plead thereto.

[9] As was held in *Living Hands v Ditz* 2013 (2) SA 368 at 374-375 the object of an exception is not to embarrass ones opponent or to take technical advantage of technical flaws but to dispose of the case or a portion thereof in an expeditious manner or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception. Further that pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of the pleading that is not self-contained.

[10] An exception will only be upheld if the party is seriously prejudiced by the particulars of claim in the manner in which it is. In *Trope v South African Reserve Bank and Another* and two other cases 1992 (3) SA 208 (TPD) it was held that if an exception to a pleading is on the ground that it is vague and embarrassing it must first be established whether the pleadings lacks particularity to the extent that it is vague and secondly whether the vagueness causes an embarrassment of such a nature that the excipient is prejudiced. The excipient referred to the decision of *Home Talk Developments Pty Limited and Others v Ekurhuleni Metropolitan Municipality* (2017) 3 All SA 382 (SCA) at paragraphs 29 to 31 that if there are allegations of fraud or dishonesty it must be supported by particulars and that the absence of such allegations

may render the particulars of claim excipiable. I was also referred to the case of Technical Systems Pty Limited and Another v RTS Industries and Another (2020) JOL 47895 (WCC) which also refers to the issue of fraud.

[11] An exception that a pleading is vague and embarrassing ought not to be allowed unless the excipient will be seriously prejudiced. See Francis v Thorp 2004 (3) SA 230 C.

[12] It was held in McKalrey v Cawon NO 1980 (4) SA 525 (Z) at 526 that if evidence can be led which can disclose a course of action alleged in the pleadings the pleadings are not excipiable.

[13] In paragraphs 13 and 15 of the particulars of claim it sets out that no payment was due and that payments were made with the intention to defraud Plaintiff. In my view there are sufficient averments for a claim based on fraud and that First Defendant would be able to plead thereto.

[14] As set out above I am satisfied that the amendments to the particulars of claim dated 6 December 2021 attaching the various documents cured any defects there may have been is apparent from a reading of the said particulars that it is alleged that there was no agreement or work to be performed and accordingly that the money was in no way payable to Second Defendant.

[15] In the premises I make the following order:

The eighth, ninth and eleventh grounds of exception, which were raised by the excipient are dismissed with costs.

BEZUIDENHOUT J.

JUDGMENT RESERVED ON: 10 AUGUST 2022

JUDGMENT HANDED DOWN ON: 18 AUGUST 2022

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