



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

CASE NO.: 232/2018

**Date heard: 02-11-2018
Date delivered: 28-06-2019**

In the matter between:

Petrus Johannes Kemp

Plaintiff

And

Business Partners Ltd

Defendant

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. The plaintiff, Mr Petrus Johannes Kemp, has instituted an action against the defendant, Business Partners Ltd, wherein he claims for the setting aside of the judgment under case no 985/2008 to the amount of R315 011.14 and certain orders in respect of costs.

2. The defendant had obtained judgment in the amount of R890 229.63 against the plaintiff in the action under case no 985/2008 on 19 June 2017. An application for leave to appeal against this judgement was refused by the trial court (Coetzee AJ) on 8 September 2017. An application to the Supreme Court of Appeal for leave to appeal was similarly refused on 8 November 2017.
3. The plaintiff contends *in casu* that the defendant's legal representatives had failed to disclose to the trial court, in circumstances where there was a legal duty upon them to do so, that the certificates of balance which were provided by the defendant and received in evidence at the trial, were incorrect and did not reflect the correct amounts owed to the defendant. The plaintiff alleges that the defendant furthermore failed to disclose this fact during argument in the application for leave to appeal neither did it do so in its opposing papers in the application to the Supreme Court of Appeal.
4. The plaintiff in its particulars of claim alleges that the certificates of balance included amounts in respect of legal fees of the defendant's attorneys which were erroneously debited to the account and the concomitant additional interest relating to the erroneous debits.
5. The defendant filed its plea to the particulars of claim on 17 April 2018 whereafter the plaintiff noted an exception to the plea on the basis that it is vague and embarrassing and lacks

the necessary averments to sustain a defence against the plaintiff's claim.

6. **The first exception** taken is to paragraphs 3 to 9 of the plea and it is couched as follows:

“1.1 Plaintiff contends that Defendant's Plea does not comply with the requirements of Rule 18(4) and 18(5) of the Uniform Rules of Court in so far as the Defendant denies all the allegations contained in the Particulars of Claim, which is not admitted in the Plea, without identifying and dealing with each and every allegation succinctly, as required by the said rule.

1.2 It is impossible to ascertain from the Defendant's allegations which facts are in fact disputed, since the Plea is couched in the form of an Answering Affidavit.

1.3 The Defendant pleads evidence, but fails and or neglects to answer the points of substance, which makes the Plea vague and embarrassing and further makes it impossible for the Plaintiff to reply thereto.”

7. In order to contextualise this ground of exception and the others following, it is necessary to comment on the manner or style with which the plea was drafted. The plea does not follow the customary form which has been the practice for very many years and hopefully will be for very many years to come. This particular plea does not, as is the norm, address the allegations in the particulars of claim under headings such as *“Ad paras 1 to 4 thereof”* and then proceed to either admit, deny or confess and avoid the allegations made in those paragraphs of the particulars of claim referred to. Instead the plea in most part

consists of a narration of the defendant's version of events, with reference in bold type to the paragraphs in the particulars of claim the narrative has reference to.

8. This type of pleading can be confusing in that it does not deal specifically and consecutively with the allegations contained in each paragraph of the particulars of claim as is the norm, resulting in a somewhat time consuming undertaking to determine exactly what has been placed in issue.
9. Mr Tredoux, who appeared for the defendant and is also the author of the plea, explains this as a new way of pleading which he has adopted after reading Rose W: Pleadings without Tears, 7th edition. The contention is that there is no Rule which requires a plea to be framed in the style we have become accustomed to, as long as the plea answers the point of substance, admits or denies or confesses and avoids all the material facts and clearly and concisely state all material facts upon which the defendant relies. While the above proposition cannot be faulted, the plea under discussion certainly does not tick all the boxes. It is certainly not to the point and concise.
10. Furthermore the plea contains a number of irrelevant facts – which do not appear to be material to any disclosed cause of action and of which the plea to paragraph 3 of the particulars of claim is a prime example.

11. Paragraphs 3 of the particulars of claim reads as follows:

“The Defendant instituted action under case number 985/2008 in the above Honourable Court of the amount of R502 374, 56 (FIVE HUNDRED AND TWO THOUSAND THREE HUNDRED AND SEVENTY FOUR RAND FIFTY SIX CENT) and ancillary relief, as surety, for Africa Unlimited Safaris CC (the first Defendant) which was liquidated during 2009.”

The plea to the above is the following:

“4. 4.1 On or about 2 May 2006 and at or near Cape Town the Defendant and the close corporation entered into a written agreement of loan with each other.

4.2 In concluding the aforesaid agreement the Defendant was represented by Pieter Barend Botha and/or Isaac Bernil Strauss, while the Plaintiff was represented by the Late Elizabeth Kemp.

4.3 A copy of the said Loan Agreement is attached to this Plea marked “PLEA.1”.

4.4 In terms of the said Loan Agreement the Defendant undertook to lend and advance the sum of R500 100.00 to the close corporation, and the latter undertook to repay the loan amount by way of 57 monthly instalments of R11, 181 each, as from 1 September 2016 along with certain royalties calculated at 3.5% plus VAT, in arrears, calculated on the actual or budgeted monthly turnover was net of VAT or the amount agreed to in annexure A2 to the standard conditions.

5 5.1 The Defendant duly discharged all of its obligations under the Loan Agreement and the close corporation became liable to make payment to the Defendant of the monthly instalments due in terms of the Loan Agreement, and also the royalties which it had agreed to pay.

5.2 The close corporation did not discharge its obligations which it owed the Defendant punctually or at all and it indeed breached the terms of the Loan Agreement As at 25 June 2008 the close corporation was substantially in arrears in respect of both its

instalments on the Loan Agreement and the Royalty repayments.

*5.3 As a consequence the Defendant instituted the action referred to in **paragraph 3** of the Particular of Claim in which it sued the close corporation.*

5.4 The Defendant also sued the late Elizabeth Kemp and the Plaintiff as sureties for the obligations of the close corporation.

*5.5 Subject to the foregoing the allegations contained in **paragraph 3** of the Particulars of Claim are admitted.*

6. 6.1 All of the Defendants in the said action entered appearances to defend.

6.2 The close corporation, however, has been liquidated; and

6.3 The late Elizabeth Kemp passed away.

6.4 In the result the trial proceeded against the Plaintiff only."

12. I do not intend to overburden this judgment with a regurgitation of the entire plea, suffice to say that the plaintiff has reason to complain that the plea does not comply with the requirements of Rules 18(4) and 18(5) which state the following:

"18(4) Every pleading 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.

18(5) When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively, but shall answer the point of substance."

13. That being said, non-compliance with the provisions of Rule 18 is deemed to be an irregular step and is dealt with in accordance with Rule 30, unless such non-compliance also renders the pleading vague and embarrassing, which would

then entitle the aggrieved party to the choice of bringing an application under Rule 30 or raise an exception in terms of Rule 23(1). Having chosen the latter option, the *onus* is on the plaintiff as excipient to show vagueness amounting to embarrassment and embarrassment amounting to prejudice. (See *Lockhat and Others v Minister of the Interior* 1960(3) 765 (DCLD) at 777 and authorities referred to therein). In *Leathern v Tredoux* 1911 NPD 346, at 348, it was said that where a statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on and therefore it is also something which is insufficient in law to support in whole or in part the action or defence.

14. Paragraphs 3 to 9 of the plea, although containing superfluous and irrelevant matter are neither vague nor embarrassing in the sense enunciated in the case law. While the form of the plea may make a comparative assessment with the particulars of claim cumbersome, the paragraphs under discussion refer specifically thereto that it is in answer to the particulars of claim's paragraphs 3 to 8 and answers all points of substance contained therein. That being said, paragraphs 7 to 9 of the plea sets out a history of the previous trial proceedings relevant to the defence raised and as such negates a finding of it being vague and embarrassing. (See *Du Toit v Du Toit* 1958(2) SA 354 (D).) It should also be guarded against assessing certain paragraphs of a pleading in isolation without having regard to

the complete pleading, from which the stance/defence of the defendant may be more fully comprehended.

15. In my view nothing in these paragraphs prejudices the plaintiff to the extent that he cannot reply thereto. One should also not lose from sight that this is an exception to a plea. The plaintiff will only need to deliver a replication if he wishes to plead fresh facts in answer to the defendant's plea.
16. This ground of exception in my view should accordingly fail.
17. **The second ground of exception** relates to paragraph 10 of the plea.
18. Besides the embellishment with which the allegations in paragraphs 9 and 10 of the particulars of claim are responded to and with which I have already dealt with in the preceding ground of exception, the complaints with regard to paragraph 10 of the plea are that it contains contradictory allegations, one of which can be interpreted to the effect that the defendant admits that its legal representatives were aware of the discrepancies in the certificates and admits not having disclosed it to the court *a quo*. Therefore, the argument goes, the plea does not disclose a defence against the plaintiff's claim and should be struck out.
19. Paragraphs 9 and 10 of the particulars of claim state the following:

- “9. At all material times and specifically on the date of trial, being the 25th of October 2016 and the 26th of October 2016, the legal representatives of the Defendant were aware that the certificates handed up on the first day of trial by the Defendant, were incorrect and did not reflect the correct amounts allegedly due to the Defendant.
10. The Defendant’s legal representatives, as officers of the court, had a legal duty to disclose to the court that the certificates relied upon by the Defendant did not reflect the correct amounts allegedly due and owing to the Defendant.”

20. In response hereto paragraph 10 of the plea reads as follows:

“10. 10.1 It is admitted that the Certificates of Indebtedness, which had been delivered 10 calendar day prior to the trial were put in evidence on 25 October 2016. To this extent the averments contained in **paragraph 9** are admitted; the remaining allegations are denied.

10.2 In amplification of the said denial the Defendant pleads that:

10.2.1 The Statement of Account which was attached to the certificates clearly indicated the manner in which the outstanding balance was made up; and that

10.2.2 The first time the Defendant’s legal representatives became aware of the issue pertaining to the legal fees was when it was raised by the Counsel for the Plaintiff.

10.2.3 The Plaintiff’s counsel specifically raised these alleged irregularities during the course of the trial and in so doing expressly challenged the propriety of including the legal fees in the outstanding balance and contended that this was impermissible – which was expressly raised with the Defendant’s witness.

10.2.4 The Plaintiff made submissions relating to the alleged irregular inclusion of the legal fees (1) at the trial; and (2) at the subsequent application of Leave to Appeal;

and the (3) the application to the SCA for Leave to Appeal;

*10.2.5 Subject to the foregoing the allegations contained in **paragraphs 9 & 10** are admitted.”*

21. The complaints are (i) that it is unclear which allegations in paragraph 9 and 10 of the particulars of claim are admitted in view of the contradictory allegations in paragraph 10.1 and 10.2.5; and (ii) the defendant's denial in paragraph 10.1 that its legal representatives were aware at the trial that the certificates were incorrect is contradicted by the apparent admission in paragraph 10.2.2, that the defendant's legal representations became aware of the issue pertaining to the inclusion of legal fees in the statement reflecting the outstanding balance at the trial.
22. With regard to the alleged contradiction in paragraphs 10.1 and 10.2.2, it is clear in my view that there is no contradiction. Paragraph 10.2.2 of the plea does not admit to incorrectness of the certificates, only to the issue or dispute thereof being raised by the plaintiff at the trial. As stated herein before, the plea should be read as a whole and if that was done it would have been noted that the defendant, in paragraph 8 of the plea, specifically states that the loan agreement permitted the defendant to claim payment of the fees on an attorney and own client basis (Read also with paragraph 10.2.1 of the plea).

23. It is in this light also that paragraphs 10.1 and 10.2.5 should be read. The argument that the plea does not disclose a defence can thus not succeed. This ground of exception has no merit.
24. **The third ground of exception** relates to paragraph 11 of the plea, which is the defendant's answer to the allegations in paragraph 11 of the particulars of claim.
25. Paragraph 11 of the particulars of claim alleges that the defendant's legal representatives failed, refused or neglected to disclose to the court at the trial that the certificates relied upon to prove the defendant's quantum were incorrect in that it included the legal fees of the defendants' attorneys of record, which were erroneously debited to the account and/or included additional interest on amounts erroneously debited to the account. In its plea the defendant responded by admitting that its legal representatives did not raise the issues pleaded in paragraph 11 of the particulars of claim but that these issues were expressly raised by the plaintiff and submissions in this regard were made to the trial court.
26. The complaint relating to paragraph 11 is that having admitted that the defendant did not disclose to the court that the certificates were incorrect and should it be found that the defendant was aware of this fact and had a duty to disclose such, then the defendant's plea does not disclose a defence against the plaintiff's claim.

This is clearly not a proper ground of exception. The plea should on the face of it not disclose a defence and the exception cannot be premised on what the court may or may not ultimately find. This ground of exception must therefore fail.

27. **The fourth exception** is taken against paragraphs 12 and 13 of the plea which are in response to paragraphs 12, 13 and 14 of the particulars of claim.

Paragraphs 12 and 13 of the particulars of claim merely state the dates upon which the applications for leave to appeal to the court *a quo* and the Supreme Court of Appeal were heard/filed and refused. Paragraph 14 alleges that the defendant failed to disclose to either of the above-mentioned courts in the respective applications that the certificates relied upon by the defendant were incorrect.

28. In answer hereto the defendant admits in the offending paragraphs of the plea that the applications referred to were heard/filed and dismissed on the dates alleged. The defendant pleads further that the plaintiff had raised the issue of the computation of the outstanding balance as per the certificates of balance pertinent and expressly in both applications and denies specifically that the SCA was unaware of the fact that the certificates were alleged to be incorrect.
29. The exception is taken on the basis that the plea is vague and embarrassing in that the defendant pleads evidence but fails to

admit or deny the allegation that it failed to disclose the issue of the alleged incorrect certificates.

30. The argument by the plaintiff in this regard again loses sight of the plea as a whole and the stance by the defendant that the certificates were not incorrect. The defendant, by not admitting or denying its failure to disclose the dispute relating to the certificates, is deemed to have admitted the allegations of non-disclosure in terms of Rule 22(3) – which is in accordance with what the defendant has pleaded from the outset. There can be nothing vague and embarrassing about this. The evidence complained about i.e. the information which the plaintiff had placed before the courts at the hearing of the respective applications, serves to provide justification for the admission of non-disclosure and is an example of confessing and avoiding, which is permissible. This ground of exception also has no merit.

31. **The fifth exception** relates to paragraph 14 of the plea which deals with paragraph 15 of the particulars of claim. Paragraph 15 of the particulars of claim reads as follows:

*“15. However, on **15 September 2017** and only after the Plaintiff filed his Application for Leave to Appeal to the Supreme Court of Appeal, the Defendant’s attorney submitted a reconciliation of the account reflecting the amounts erroneously debited to the principal debtor’s account, in the amount of at least **R315, 011.14 (THREE***

HUNDRED AND FIFTEEN THOUSAND AND ELEVEN RAND FOURTEEN CENT). *A copy of the reconciliation is attached hereto, marked as annexure “PJK3”.*

32. The defendant in paragraph 14 of the plea, admits that it provided the plaintiff with annexure “PJK3” and pleads that the document was provided in good faith for the purposes of settlement negotiations and marked “*without prejudice*.” The defendant further denies that the amounts were erroneously debited and avers that the amount of R315 011, 14 is clearly reflected in the document as amounts paid by or on behalf of the principal debtor. Furthermore it is pleaded that the amount set out in annexure “PJK3” only reflects part of the plaintiff’s indebtedness to the defendant.
33. The plaintiff complains that this paragraph in the plea is vague and embarrassing in that it does not contain facts and that the allegations are argumentative and contain evidence which is inadmissible.
34. When one looks at the attached annexure however, it is clear that the amount of R315.011.14 comprises credits to the account and not debits as alleged by the plaintiff. The plea in this regard can therefore not be said to be argumentative or evidence but is an obvious fact which the defendant is allowed to plead.
This ground of exception can therefore not stand.

35. **The sixth and final exception** is taken to paragraphs 16 and 17 of the plea which respond to paragraphs 18 and 19 of the particulars of claim. The complaints are that paragraph 16 is vague and embarrassing, and does not comply with Rule 18(4) since the allegations are argumentative and constitute opinion which is inadmissible. With regard to paragraph 17 the argument is that paragraphs 17.3.1 to 17.3.4 do not support defendant's conclusion that plaintiff is not entitled to the relief sought without pleading specific facts to sustain a defence of *res iudicata*.

Although Mr Janse Van Rensburg for the plaintiff had not dealt specifically with this ground of exception during argument, it has also not been withdrawn. I therefore deal with it only briefly.

36. Paragraphs 18 and 19 of the particulars of claim state the following:

"18. The Plaintiff immediately furnished security for the full amount of the Judgment, pending finalization of this action.

19. Had it not been for the Defendant and/or its legal representatives conduct aforesaid and have the correct facts been disclosed before or during trial, the Plaintiff would not have proceeded to trial and incurred the legal costs he had to incur."

37. Paragraphs 16 and 17 of the plea reads as follows:

16.16.1 *The Plaintiff pleads that he paid an amount of money into his attorneys trust account.*

16.2 *The Defendant denies that this constitutes the provision of adequate security for the Defendant's claims, and it does not cause the running of interest to be stopped.*

16.3 *The remaining allegations in **paragraph 18** are denied.*

17.17.1 *The allegations contained in **Paragraph 19** are denied.*

17.2 *In amplification the Defendant refers to the facts and circumstances set out hereinabove, and pleads that the Plaintiff has not set out sufficient averments in order to sustain a viable cause of action.*

17.3 *In amplification the Defendant pleads that:*

17.3.1 *The Plaintiff was at all material times aware of the facts and circumstances pleaded in paragraph 11 of the Particulars of Claim, which were expressly raised with the Trial Court and at the application for leave to appeal;*

17.3.2 *The Plaintiff himself caused the facts and circumstances referred to in paragraph 11 of the Particulars of Claim to be brought to the attention of the both the Trial Court and the SCA;*

17.3.3 *The Plaintiff, the trial Court and the SCA were thus at all material times aware of the alleged defects in the certificates;*

17.3.4 *In the premises the alleged non-disclosure cannot in law be relied upon for the purposes of setting aside the judgment of the trial court or the decisions refusing the Plaintiff permission to appeal against said judgment."*

38. The complaint relating to paragraph 16 does not need any further discussion and I can merely refer to paragraph 13 herein above.

39. With regards to paragraph 17 of the plea, I am not too clear about the exact complaint. The defendant has not pleaded *res iudicata*, but rather that the plaintiff on his own version has not made out a case for the setting aside of the judgment. Which has been pleaded throughout and is what paragraph 17 reiterates.

There is no merit in this ground of exception.

In the premises the following order is made.

The exceptions raised by the plaintiff are dismissed with costs.



CC WILLIAMS

JUDGE

For Plaintiff: Adv FG Janse Van Rensburg
Becker Berg & More Inc
c/o Elliot Maris Wilmans & Hay

For Defendant: Adv P Tredoux
Gillian & Veldhuizen Inc
Engelsman Magabane Inc