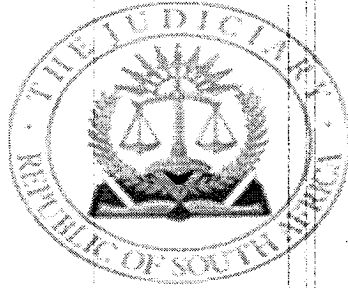


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 1653/2019

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

06/08/19.....

Date

ML TWALA

In the matter between:

KERRY WYNDHAM COOKE

EXCIPIENT

AND

THERMO-FACADES (PTY) LIMITED

RESPONDENT

JUDGMENT

TWALA J

- [1] In this application, the applicant seeks an order to strike out the plaintiff's particulars of claim to the summons on the basis that it is vague and embarrassing and lacks the necessary averments to sustain a course of action. The application is opposed by the respondent.
- [2] The plaintiff instituted action against the defendant for payment of the sum of R1 260 000 based on an written agreement of sale of property which was entered into by the parties on the 17th of November 2016 in Sandton and, in the alternative based on the written acknowledgement of debt signed by defendants in Sandton on the 30th May 2017. The action is defended and the defendant filed a notice of exception raising 3 causes of complaint and called upon the plaintiff remove same within 15 days. The plaintiff insisted that there is nothing amiss with its particulars of claim and elected not to attend to what the excipient complained about.
- [3] In order to put context to the material issues in this case, I consider it necessary to quote the relevant paragraphs of the particulars of claim and I propose to confine myself to Claim A:

Claim A

"Paragraph 4

4.1 on or about the 17th November 2016, and at Sandton, the plaintiff, on the one part, and the first and second defendants,

on the other, concluded a written agreement of sale (“the agreement”) in terms whereof the plaintiff sold to the first and second defendants a unit consisting of Section No. 15 and more fully

4.2 described on Sectional Plan No. SS27/2017 in the scheme known as Urban View on Westcliff situated at Forest Town Township, Local Authority, City of Johannesburg (“the property”)

4.3 at the time of the conclusion of the agreement:

4.3.1 the plaintiff was represented by Jose Sanchez;

4.3.2 the first and second defendants acted personally.

4.4 a true copy of the said agreement is annexed hereto marked “POC1”, and its material terms, for the present purposes relevant, comprised the following:

4.4.1 the plaintiff sold to the first and second defendants the property for a total purchase price consideration of R4 800 000 (“the purchase price”);

4.4.2 the purchase price was payable by way of an initial deposit, and the balance thereof in cash against registration of transfer of the property;

4.4.3 registration of the property was required to be effected by the plaintiff’s nominated attorneys simultaneously with the opening of a sectional register.

5. All conditions precedent identified in the agreement were fulfilled, and the property was registered in the names of the first and second defendants on the 22nd of May 2017.

6. *In breach of the terms of the agreement defendants failed to pay to the plaintiff the balance of the purchase price in an amount of R1 260 000 which currently remains due, owing and payable, and which amount, despite demand, defendants refuse, fail and/ or neglect to pay.*

Alternative to the foregoing:

7. *On or about 30th May 2017, and at Sandton, the first and second defendants, acting personally, jointly acknowledged in writing their indebtedness to the plaintiff in the amount of R1 260 000 together with agreed interest thereon at the rate of 10.5% per annum (at prime rate) with effect from 22nd May 2017.*
8.
 - 8.1 *a true copy of the said acknowledgment of debt is annexed hereto marked "POC2".*
 - 8.2 *in its terms, payment of the amount of R1 260 000 by the defendants to the plaintiff, together with the requisite interest thereon, was required to be paid by the first and second defendants by 30th November 2017;*
 - 8.3 *In the event of a breach of its terms, defendants undertook to pay to plaintiff legal costs incurred by it in the event of it instituting action for the recovery of the said amount, on an attorney and client scale.*
9. *Notwithstanding demand, the first and second defendants fail, refuse and/or neglect to pay to plaintiff the said sum of R1 260 000 or any portion thereof.*

[4] It is trite that an exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. It is not

directed at a particular paragraph within the cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing.

- [5] In *M Ramanna and Associates cc v The Ekurhuleni Development Company (Pty) Ltd*, case No: 25832/2013 (4 April 2014) ZAGPJHC this Court stated the following:

“it is 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 abolition of the requests for further particulars of pleading and 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; and the cause of action or defence must appear clearly from the factual allegations made.

The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed and this fundamental principle can only be achieved when each party states his case with precision”.

- [6] In *Khan v Stuart* 1942 CPD 386 at 392 a decision which was quoted with approval in the Ramanna case supra, the Court stated the following:

“it is the duty of the court, when an exception is taken to a pleading, first to ascertain if there is a point of law to be decided which will dispose of the case in whole or in part. Unless the excipient can satisfy the court that there

is such a point of law or such real embarrassment, then the exception should be dismissed”.

- [7] At the outset, I do not consider it necessary to deal with each and every paragraph of the plaintiff's particulars of claim to the summons against which a complaint has been raised since it is trite that the duty of the Court is to consider the plaintiff's particulars of claim as a whole. I will however endeavour to identify those that I consider material in this case.
- [8] There is a plethora of authority that where a pleading lacks averments necessary to sustain a cause of action, it is either meaningless or ambiguous and capable of more than one meaning or can be read in any one of a number of ways. Where a Court upholds an exception which alleges that a pleading is vague and embarrassing, leave to amend is generally granted to the party which produced the excipiable pleading. However, where an exception to a pleading is brought on the ground that it is vague and embarrassing, it involves a two-fold enquiry, the first being whether the pleading lacks particularity to the extent that it is vague and secondly whether the vagueness causes embarrassment of such a nature that one is prejudiced to the extent that it is unable to properly prepare to meet the case of its opponent.
- [9] I am unable to agree with counsel for the excipient that the particulars of claim are not clear as to how the amount of R1 260 000 is arrived at. This figure is easily ascertainable when the particulars of claim are considered in the whole. The purchase price was agreed at the sum of R4 480 000 and the balance has not been settled or paid in full after the deposit was paid which leaves a sum of R1 260 000. In my view, there is nothing vague on this point that can be said will embarrass the defendant when pleading to the

plaintiff's claim. I therefore conclude that the exception falls to be dismissed on this ground.

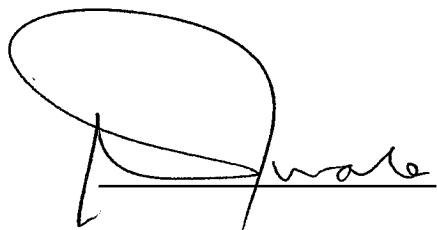
[10] The excipient further makes issue on the allegation by the plaintiff that all conditions precedent in the agreement have been fulfilled and yet the plaintiff claims a sum of R1 260 000 from the transaction. I do not agree. Payment of the purchase price was not a condition precedent in the agreement – hence the plaintiff agreed that the property be transferred into the names of the defendants before payment of the full purchase price. This, in my view, does not preclude the defendants from pleading and the exception on this ground falls to be dismissed.

[11] I do not intend to involve myself in the discussion whether or not an acknowledgment of debt is an agreement as defined in the National Credit Act, 35 of 2005 (“the Act”). The excipient's complaint is that the respondent did not comply with s129(1) and 130(1) of the Act. In my respectful view, there is no merit in this ground and argument. Non-compliance with the provisions of s129 and 130 of the Act is a defence on its own and cannot be brought about by way of exception but can be pleaded – thus the irresistible conclusion is therefore that the defendants are not precluded from pleading to the particulars of claim by the non-compliance with the provisions of the Act and the exception falls to be dismissed on this ground as well.

[12] I am of the respectful view therefore that the excipient has failed to establish a case that the plaintiff's particulars of claim to the summons are vague and embarrassing and lack the necessary particularity to enable it to plead thereto.

[13] In the circumstances, I make the following order:

1. The exception to the plaintiff's particulars of claim is dismissed with costs,

A handwritten signature in black ink, appearing to read 'Twala', written over a horizontal line.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 29th July 2019

Date of Judgment: 8th August 2019

For the Excipient: Adv. S Saunders

**Instructed by: Andre Pienaar & Associates
Tel: 011 443 7829**

For the Respondents: Adv. M M Segal

**Instructed by: Breder-Friedland Inc Attorneys
Tel: 082 603 9640**