



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER:7271/2019

(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHERS JUDGES: YES /NO	
(3) REVISED	
<i>Bamiro</i> SIGNATURE	<i>27/5/2021</i> DATE

In the matter between:

MOKGAETJI GLADYS MAMOPGOPA

Plaintiff

And

**ALEXANDER FORBES FINANCIAL
SERVICES (PTY) LTD**

First Defendant

MINES 1970 PROVIDENT FUND

Second Defendant

JUDGMENT

BARNARDT AJ

1. For determination are the exceptions raised by both defendants against the plaintiff's particulars of claim on the basis that her particulars of claim do not disclose a cause of action against either of them and/or are vague and embarrassing.

FACTUAL BACKGROUND

2. Both defendants defended the plaintiff's claim as set out in the particulars of claim, signed on 30 September 2019, and filed notices of intention to except in terms of Rule 23 of the Uniform Rules of Court.

3. The plaintiff opted not to remove the causes of complaint as raised and both excepted against the plaintiff's particulars of claim. The first defendant's exception as well as the second defendant's exceptions (two were filed) were served on 20 January 2020.

4. The defendants filed their heads of argument in support of the exceptions raised in May 2020 (second defendant) and June (first defendant) respectively and the plaintiff was, due to her failure to file heads of argument, specifically requested on 1 July 2020, to do so.

5. Notwithstanding the request, the plaintiff failed to file her heads of argument and the second defendant tried to bring an application to compel since July 2020, but no date was set by the registrar.

6. The exceptions were set down on the opposed motion roll of 8 March 2021, and the set down was served on the plaintiff's attorney of record on 11 February 2021. The

plaintiff's attorney of record was once again reminded that the exception hearing was set down on the opposed motion roll of 8 March 2021 in a letter, dated 3 March 2021.

7. The first defendant's practice note was uploaded on Caselines on 25 February 2021 and the second defendant uploaded two practice notes, the first on 26 February 2021 and the second practice note on 3 March 2021.

8. On 2 March 2021, the registrar published my directives with a list of allocated matters and according to the list this matter was set down for hearing at 14:00 on 9 March 2021. The directives specifically stated that all matters would be argued virtually, and consequently all parties had to be present.

9. On Sunday 7 March 2021, the plaintiff uploaded a practice note wherein she requested that the matter should be removed from the roll due to non-compliance with the Judge-president's directives, regarding the bringing of an application to compel.

10. When this matter was called on 9 March 2021 there was no appearance on behalf of the plaintiff, and I requested counsel for the first defendant to contact the plaintiff's attorney with a request to join the hearing.

11. I was informed in open court, that Mr. Matemane, plaintiff's attorney of record, will not be joining the hearing, since he was elsewhere occupied.

12. I considered the plaintiff's request that the matter should be removed from the roll but decided against it and proceeded in the absence of Mr. Matemane who preferred not to attend the hearing. The plaintiff had ample time to file her heads of argument but failed to do so without tendering any explanation for her failure. To allow the plaintiff to hide behind the practice directives would be a travesty of justice in these circumstances.

EXCEPTIONS

13. “An exception is a legal objection to the opponent’s pleading. It complains of a defect inherent in the pleading: admitting for the moment that all the allegations in a summons or plea are true, it asserts that even with such admission the pleading does not disclose either a cause of action or a defence, as the case may be. It follows that where an exception is taken, the court must look at the pleading excepted to as it stands: no facts outside those stated in the pleading can be brought into issue – except in the case of inconsistency – and no reference may be made to any other document. ... In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence is disclosed; failing this, the exception ought not to be upheld.”¹

14 Several grounds for exception were raised and I will deal with the ground separately.

15. On behalf of the second defendant an exception was raised against the fact that the plaintiff failed to plead any basis in law or fact from which it may be concluded that this court has jurisdiction over the defendants, because both defendant’s registered offices and/or places of business are situated in Sandton, Gauteng Province.

16. This ground of exception was not pursued in the second defendant’s heads of argument and since both the main and local division still have concurrent jurisdiction, notwithstanding the fact that the High Court may, if it is in the interest of justice transfer the matter to another court, in accordance with the order granted in the ***Nedbank v Thobejane and related matters***² this ground of exception is dismissed.

¹ Erasmus, Superior Court Practice Volume 2 D1-293-294 (Service 13, 2020)

² Saflii (84041/15)[2018] ZAGPPHC 692 (26 September 2018)

17. Both defendants excepted against the particulars of claim on the basis that the plaintiff did not indicate whether she seeks judgment against the first or second defendants, or both and if so, whether the liability is joint or joint and several.

18. However, paragraph 19 of the particulars of claim reads as follows:

“In the premises the defendants are indebted to the plaintiff in the sum of R836 355.12, the one paying the other to be absolved.”

Although this could have been put more eloquently and included in paragraph 20 of the particulars of claim, the plaintiff indicated that she regards the defendants to be jointly and severally liable and therefore, this ground of exception is dismissed.

19. The first defendant raised the following additional grounds of exception:

“2. Insofar as the plaintiff seeks judgment against the first defendant, the particulars of claim do not disclose a cause of action against the first defendant and is vague and embarrassing as it is unclear on what basis judgment is being sought.

2.1 No cause of action against the first defendant is pleaded or identified in the particulars of claim.

2.2 It is not stated whether the claim against the first defendant is based on delict or contract or a statutory provision or some other cause of action.

2.3 The particulars of claim suggest that the claim is based on the plaintiff's brother's pension benefit. Although the second defendant is cited as a pension fund, the first defendant is simply cited as a company, and it is unclear on what basis the first defendant can conceivably be liable to make payment to the plaintiff.

3. Paragraph 17 read with paragraphs 5 to 7:
 - 3.1 The plaintiff's claim seems to be in respect of the death benefit of her late brother who it is alleged was a member of the second defendant.
 - 3.2 Section 37C of the Pension Funds Act provides that a death benefit payable by a pension fund shall not form part of the assets in the estate of such a deceased member.
 - 3.3 Accordingly, the executor of the deceased estate and heirs of the deceased have no claim in respect of a death benefit, and the plaintiff's assertion that she claims in her capacity as "*the executor and beneficiary*" of the estate of her brother is therefore bad in law.
 - 3.4 Accordingly, the plaintiff has failed to plead facts to show that she has locus standi, and therefore she has failed to disclose a cause of action in particulars of claim.
 - 3.5 In addition, the plaintiff's assertion that she claims in her capacity as executor and beneficiary renders the particulars of claim vague and embarrassing.

4. Ad paragraphs 5 and 6:
 - 4.1 The plaintiff fails to provide any details as to the identity and date of death of the plaintiff's brother.
 - 4.2 The "*unclaimed benefit*" of the plaintiff's brother is not described and no reference or detail of that benefit is provided.

4.3 The first defendant has no way of knowing how to identify that benefit, and accordingly the particulars of claim contained insufficient particularity to enable the first defendant to plead thereto.

5. Paragraphs 12 to 14:

5.1 The plaintiff fails to state who contacted the South African Revenue Service, and to whom the South African Revenue Services made the indications to, and when this correspondence took place.

5.2 The application for a tax directive is not attached to the summons, and no detailed explanation of the contents of that application is furnished, and the significance of the date of accrual is not explained.

5.3 Accordingly, the particulars of claim contain insufficient particularity to enable the first defendant to plead thereto.

6. Paragraphs 15 to 18:

6.1 The plaintiff pleads in paragraph 15 that, according to actuarial calculations provided by the first defendant, "*an amount due to the plaintiff as at 31 August 2016 was R8 082,39.*"

6.2 The plaintiff goes on, in paragraph 18, to state that the first defendant has neglected and refused to pay the sum of R836 355,12 "*as claimed by the plaintiff*".

- 6.3 No explanation is furnished as to how the amount owing to the plaintiff varies from the amount owed by the plaintiff on 31 August 2016.
- 6.4 Accordingly, the particulars of claim contain insufficient particularity to enable the first defendant to plead thereto, and are vague and embarrassing”

20. The relevant additional grounds of exception raised by the second defendant are the following:

20.1 In its first exception:

- “1. The plaintiff claims payment of the sum of R836 355.12 from the first and second defendants –
 - 1.1 The plaintiff has failed to set out whether the claim against the second defendant is contractual or delictual in nature.
 - 1.2 To the extent that the plaintiff’s claim against the second defendant is alleged to be contractual in nature, the plaintiff has failed to set out whether the contract is written or oral and when, where and by whom it was concluded.
 - 1.3 The plaintiff has failed to set out how, when or where the cause of action purportedly giving rise to the claim against the second defendant is alleged to have arisen.
 - 1.4 The plaintiff has failed to set out how the sum of R836 355.12 has been calculated and the basis upon which the aforesaid sum is claimed as against the second defendant;”

20.2 In its second exception:

- “1. The plaintiff has failed to plead any factual or legal basis in support of her claim against the second defendant.
 - 1.1 The plaintiff has failed to set out any contractual or other basis upon which to assert that the second defendant was indebted to the deceased and/or responsible for the payment of the sum claimed by the plaintiff on behalf of the deceased estate.
 - 1.2 The plaintiff has failed to plead any basis upon which to assert that the second defendant has a duty in law to make payment of the sum claimed by the plaintiff on behalf of the deceased estate.
 - 1.3 The plaintiff has failed to allege that the second defendant breached any contractual or other obligation owed to the deceased and/or the deceased estate which breach is alleged to have given rise to the plaintiff’s claim.
 - 1.4 The plaintiff has failed to plead any causal nexus between her claim and any act or omission by the second defendant, and/or that any act or omission by the second defendant was wrongful and/or negligent.
 - 1.5 The plaintiff has failed to plead that that the sum claimed was ever demanded from the second defendant by the deceased or any party on behalf of the deceased estate and that the plaintiff has failed to make payment of the sum claimed.

1.6 Consequently no cause of action is disclosed in respect of the second defendant.”

21. On scrutiny of the particulars of claim apart from several other deficiency, the most glaring is the fact that neither the name of the plaintiff’s brother, nor his date of death or his pension or provident fund number is mentioned.

22. Without discussing every ground of exception raised, I am convinced that the plaintiff did not disclose a cause of action and that the particulars of claim is vague and embarrassing for the reasons set out in the exceptions raised.

23. I therefore order as follows:

ORDER

1. The grounds of exception as raised by the first defendant in paragraphs 2 - 6 of its notice in terms of rule 23(1), dated 19 November 2019 (see paragraph 19 above) is upheld.
2. The grounds of exception raised by the second defendant in paragraphs 1.1 - 1.4 of its notice in terms of rule 23(1) dated 20 November 2019 (see paragraph 20.1 above) is upheld.
3. The grounds of exception raised by the second defendant in paragraph 1.1 - 1.6 of its second notice in terms of rule 23(1) dated 20 November 2019 (see paragraph 20.2 above) is upheld.

4. The plaintiff is ordered to amend her particulars of claim within 15 days of service of this order on the plaintiff's attorney of record, failing which her action against the first and second defendant will be dismissed with costs.
5. The plaintiff is ordered to pay the costs of this application.

J Barnardt

**ACTING JUDGE JF BARNARDT
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 May 2021.

APPEARANCES

For the applicant: Mr. L Matemane

Instructed by: Matemane Attorneys.

For the first respondent: Adv P van der Berg SC

Instructed by: Thyne Jacobs Inc.

For the second respondent: Adv C Marule

Instructed by: Edward Nathan Sonnenbergs Inc

Date of hearing: 8 March 2021

Date of Judgment: 27 May 2021