IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

...10/2/2021..... .....
DATE SIGNATURE

Case number: 24675/2019

In the matter between:

LAMIN8 WINDOW FILM CC Plaintiff/Excipient

(Registration number: 2008/039218/23)

And

CUSTOM PROTECTION PRODUCTS CC First Defendant/Respondent

(Registration number: 2009/116105/23)

MEYER HELGARD PHEIFFER Second Defendant/Respondent

(Identity number: [….])

LILANI PHEIFFER-HEATH Third Defendant/Respondent

(Identity number: [….])

JUDGEMENT

MULLINS AJ

INTRODUCTION:

[1] The plaintiff in this matter, Lamin8 Window Film CC, has raised an exception against the counterclaim of the first defendant, Custom Protection Products CC, on the grounds of vagueness and embarrassment, alternatively failure to disclose a cause of action.

[2] The parties agreed in their practice notes that I might decide the matter on the strength of the papers (including their heads of argument), without the need for oral argument. The matter is not particularly complex, and in the circumstances I was prepared to do so.

THE BACKGROUND TO THE EXCEPTION:

[3] The plaintiff sues the first defendant (together with two other defendants as sureties; its claim against them is not at issue in this exception) for payment of R406 349.11, for goods sold and delivered by the plaintiff to the first defendant over the period December 2018 and January 2019, in the form of automotive protective film.

[4] The defendants filed a plea, together with a counterclaim by the first defendant.

[5] As pointed out above, the exception is directed at the counterclaim.

THE FIRST DEFENDANT'S COUNTERCLAIM:

[6] The counterclaim incorporates certain admitted paragraphs of the particulars of claim, and one paragraph of the plea.

[7] So read together, the counterclaim is broadly to the effect that (a) in 2016, the plaintiff appointed the first defendant as the plaintiff's sole accredited marketer and installer in South Africa of a product described as XPel Ultimate Paint Protection Film ("XPel Ultimate"), (b) the first defendant purchased protective film from the plaintiff over the period December 2015 to February 2017, (c) what the plaintiff actually provided to the first defendant wasn't XPel Ultimate but a lesser product intended solely for training purposes and not for the retail market called XPel F8000 Paint Protection Film ("XPel F8000"), and (d) this was a result of misrepresentation as to what was being sold and delivered, causing the first defendant to suffer damage in the total amount of R7 013 882.34, comprised of (i) the difference between the R2 798 562.13 which the first defendant paid for the film (thinking it was XPel Ultimate) and the R1 399 281.06 (50%, rounded off downward) it would have paid had it known that what it was purchasing was XPel F8000, i.e. R1 399 281.07, (ii) R107 031.00 for the cost of replacing already-installed XPel F8000 on motor vehicles with the correct XPel Ultimate, and (iii) R5 507 570.27 for the prospective costs of removing XPel F8000 from motor vehicles onto which it has been fitted, and replacing it with XPel Ultimate.

THE EXCEPTION:

[8] The exception consists of three grounds, each to the effect that the counterclaim is either vague and embarrassing, or doesn't disclose a cause of action.

[9] These three grounds are the following:

(a) The first ground relates to the claim for R1 399 281.07. It is to the effect that the bald allegation that XPel F8000 film was delivered over the period December 2015 to February 2017 doesn't enable the plaintiff to determine how much of the alleged debt might have been extinguished by prescription, given that the counterclaim was delivered on 23 October 2019.

(b) The second and third grounds are similar. They are to the effect that the allegations relating to the claims for R107 031.00 and R5 507 570.27 are defective firstly in that they are "insufficient to sustain a cause of action in delict against the plaintiff in that the first defendant has failed to make the necessary allegations of causality and damages arising from the alleged wrongful conduct [or to] …. allege any facts in support of a claim concerning the replacement installation of protective film on any vehicles", and secondly in that it is unclear how the amounts of R107 031.00 and R5 507 570.27 are comprised.

FIRST THE QUESTION OF DISCLOSURE OF A CAUSE OF ACTION; THEN THE QUESTION OF VAGUENESS AND EMBARRASSMENT:

[10] Although the exception is raised on the grounds of vagueness and embarrassment first, and failure to disclose a cause of action only in the alternative thereto, I find it more convenient (and indeed more logical) to approach it in the opposite order, viz first whether the grounds of exception are good in respect of the disclosure of a cause of action, and second whether the grounds are good in respect of vagueness and embarrassment.

THE TEST ON EXCEPTION:

[11] The law is clear to the effect that in considering an exception on the grounds of a failure to disclose a cause of action, the court must accept the allegations pleaded by the party against whom exception is taken as true. See Hlumisa Investment Holdings (RF) Ltd and Ano v Kirkinis and Others 2020 (5) SA 419 (SCA) in paragraph [22]:

> In deciding an exception a court must take the facts alleged in the pleading as being correct. It is for the excipient to satisfy the court that the conclusion of law set out in the particulars of claim is unsustainable …. The facts are what must be accepted as correct; not the conclusions of law.

ON THAT BASIS, ARE THE GROUNDS OF COMPLAINT GOOD IN RELATION TO THE NEED TO DISCLOSE A CAUSE OF ACTION?

[12] I am satisfied that the counterclaim discloses a cause of action.

[13] In the first place, and with reference to the first ground of complaint outlined in paragraph 9 above, there is no principle of law or of procedure which requires a pleader to assist his opponent to raise prescription against him.

[14] The burden of proving prescription rests with the party who alleges it (see Gericke v Sack 1978 (1) SA 821 (A)), and it is not for the first defendant to assist the plaintiff by making allegations that would render the plaintiff's task in raising and proving prescription against the first defendant's counterclaim easier.

[15] The counterclaim was delivered on 23 October 2019. Three years before that (i.e. the normal prescription period outlined in Section 11(d) of the Prescription Act 68 of 1969; assuming for those purposes that prescription began running three years before the counterclaim was filed, notwithstanding the provisions of Section 12(3) or Section 12(2) of the Prescription Act) will have commenced on 24 October 2016.

[16] Apart from the fact that it is evident from the counterclaim, applying the credulous test outlined in paragraph 11 above, that the first defendant won't have known at the time that it was purchasing XPel F8000 instead of XPel Ultimate, so that one imagines that section 12(3) (and, given the allegations of misrepresentation, perhaps even Section 12(2)) of the Prescription Act would come into play, there is nothing whatsoever to prevent the plaintiff from pleading prescription in respect of so much of the counterclaim as relates to product delivered prior to 24 October 2016 (without stipulating the exact amount in question; because the plaintiff won't know what that amount is. It isn't necessary for the plaintiff to be specific as to the exact amount in

question), and from thereafter establishing through the process of discovery and perhaps the Rule 21(2) process how much of the claims relates to a debt which arose before 24 October 2016.

[17] So much for the first ground of complaint.

[18] The second and third grounds of complaint have two components, viz (a) an alleged failure to make out a claim in delict, and (b) failure to disclose how the amounts of R107 031.00 (past replacement of installed XPel F8000 with XPel Ultimate) and R5 507 570.27 (envisaged future replacement of installed XPel F8000 with XPel Ultimate) are comprised.

[19] I don't agree that the counterclaim fails to make out a claim in delict. In this regard:

(a) As was said by Blieden J in Southernport Developments (Pty) Ltd v Transnet Ltd 2003 (5) SA 665 (W), the court must not look at the pleading with a magnifying glass. Minor blemishes in a pleading can be cured by further particulars, and should not be the subject of exception.

(b) Accepting the factual allegations contained in the counterclaim to be true as per the approach outlined in paragraph 11 above, it is plain to me that the counterclaim is indeed a claim in delict, based on intentional misrepresentation (telling the plaintiff that what was being sold and delivered was XPel Ultimate, whereas what was in fact being provided was XPel F8000).

(c) On that basis, I am without any difficulty able to discern a cause of action in respect of all three components of the counterclaim.

(d) As far as the claim for R107 031.00 is concerned, I have no difficulty in discerning from the counterclaim that what the first defendant is saying is that (a) it thought that what it was purchasing from the plaintiff was XPel Ultimate, (b) for that reason, what it represented to clients it was installing on their vehicles was XPel Ultimate (this will follow automatically from the previous fact; it isn't stated in the particulars of claim, which would have been much neater had it been stated. But it wasn't essential to be stated), (c) it transpires that what it was purchasing and what it was installing was in fact the lesser XPel F8000, and (d) it had to go back to certain of those clients and replace what it had installed with what it should have installed, at a total cost of R107 031.00.

(e) The same applies to the claim for R5 507 570.27, save that there we are dealing with an anticipated future cost, in terms of replacing the installations of other clients.

(f) Causality and damage arising from allegedly wrongful conduct is, thus, alleged (whether it is convincingly alleged is of course another matter, on which I will not touch).

[20] As far as the second component is concerned, whilst it is so that Rule 18(10) requires a party suing for damages to "set them out in such a manner as will enable the [other party] … reasonably to assess the quantum thereof", failure

to comply with this rule doesn't constitute a failure to make out a cause of action (I will deal below with whether it results in vagueness and embarrassment).

[21] It follows that in my view none of the grounds of exception are good in respect of the alleged failure of the counterclaim to disclose a cause of action.

VAGUE AND EMBARRASSING?

[22] The authorities are to the effect that questions of whether a pleading is vague and embarrassing must be determined on real considerations of usefulness and prejudice.

[23] See in this regard Makgoka J's very useful exposition of the applicable principles on pp 374-375 of Living Hands (Pty) Ltd and Ano 2013 (2) SA 368 (GSJ) (in what follows, I have quoted only those aspects of the judgement that relate to the vague and embarrassing issue):

> Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:
>
> (a) ….
>
> (b) The object of an exception is not to embarrass one's opponent …, but to … protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.
>
> (c) ….
>
> (d) ….

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) ….

(g) Minor blemishes and un-radical embarrassments caused by a pleading can and should be cured by further particulars.

[24] On that basis, my reasoning outlined above with regard to the first cause of complaint, and the second and third causes of complaint insofar as they relate to the making out of a claim in delict, applies equally here – there is no substance to any of these complaints.

[25] Specifically, and with reference to Rule 18(4) (on which the plaintiff's heads of argument relied in this regard), I am satisfied that the counterclaim outlines the necessary material facts to make out a claim with sufficient particularity to enable the plaintiff to reply thereto.

[26] Turning to the fact that the counterclaim doesn't furnish detail of how the amounts of R107 031.00 and R5 507 570.27 are comprised, and what I said in paragraph 20 above:

(a) I don't think it can be disputed that the counterclaim doesn't set these claims out in such a manner as would enable the plaintiff reasonably to assess the quantum thereof, were that what the plaintiff wanted to do.

(b) It follows that, although perhaps somewhat technical (given that the plaintiff probably contests the underlying allegations in any event, so that it probably has no real interest in how the counterclaim is actually

comprised), a Rule 30(1) objection could be taken to the counterclaim. But that is not what the plaintiff has done.

(c) There is authority to the effect that failure to comply with the requirements of Rule 18(10) can found an exception on the grounds of vagueness and embarrassment. See the judgement of Southwood J in Nasionale Aartappel Kooperasie Bpk v PriceWaterhouseCoopers Ing en Andere 2001 (2) SA 790 (T) at 797 and further.

(d) But as Southwood J said in that judgement, quoting Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 1070H, the degree of precision required of a pleader depends on the circumstances of each case.

(e) In this context, I can't see that the first defendant's failure to have set the damages out in such a manner in the counterclaim as to enable the plaintiff reasonably to assess the quantum thereof has caused the plaintiff any embarrassment or prejudice. I am sure the plaintiff takes issue with the first defendant's contentions of misrepresentation. I don't believe the plaintiff has any need to assess the first defendant's counterclaim in terms of value. The plaintiff is not inhibited in pleading to the counterclaim. To uphold the exception on the grounds that non-compliance with Rule 18(10) equates *in these circumstances* to vagueness and embarrassment, would be to elevate form over substance.

[27] In the premises, I am also satisfied that the grounds of exception are not good when viewed through the prism of vagueness and embarrassment.

CONCLUSION:

[28] It follows that the exception must be dismissed. There is no reason why costs shouldn't follow the result.

[29] In the premises, I order that the Plaintiff's exception to the first defendant's counterclaim is dismissed, with costs.

JF MULLINS
ACTING JUDGE OF THE HIGH COURT

Appearances:

Plaintiff/excipient's counsel:	AL Ashworth
Defendant/respondent's counsel:	G Weich
Plaintiff/excipient's attorneys:	WITZ INC
Defendant/respondent's attorneys:	HERMAN VERMAAK ATTNYS
Date of hearing:	Week of 8-12 February 2021
Date of judgement:	10 February 2021