THE USE OF AN "EXCEPTION" AS A DELAYING TACTIC

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14 July 2019

Keywords:
South African Law
Exceptions
Law
High Court
Litigation

Litigants are using Exceptions to cause delays in litigation. This has become the rule, rather than the exception… will this finally change in 2019?

1. Introduction

Over the last decade, it has become an increasingly popular tactic by attorneys, to deliver a Notice to Remove Cause of Complaint[1], or deliver an Exception[2] in order to buy some time for their clients in a matter, whether it be to allow them to gather sufficient funds to pay the outstanding debt they are being sued for, or to liquidate their company.

Many Defendants also attempt to have their proverbial "*bread buttered on all sides*", by delivering a document cloaked as an Exception, but incorporating an Application in terms of Rule 30A, without having delivered any Notice to such an effect, as required by the South African Uniform Rules of Court.

These days, more often than not, the delivered "*Notice of Exception and Notice to Set Aside*" amounts to an abuse of process, as many litigants deliver large amounts of individual Exceptions, contained in one document, each of which relates to a specific paragraph of the Particulars of Claim, and not the Particulars of Claim as a whole. In my opinion, this is contrary to the spirit and purpose of Exceptions, and this type of conduct simply causes delay, and occasions unnecessary legal costs.

"an Exception process is not intended to be used to delay a matter or to avoid the Plaintiff's Claim from being heard.."

1.1. Exceptions in the South African High Courts

The grounds on which the exception is founded must be stated clearly and concisely[3].

An Exception process is not intended to be used to delay a matter or to avoid the Plaintiff's Claim from being heard, any process which has this intention of delaying a matter, should attract an appropriate cost order.

In using this tactic, it has become increasingly popular for Defendants to use a shotgun approach in delivering their Exceptions and Notices to Set Aside. Many litigants do not request anything to be struck out, and they simply proceed to nit-pick each and every paragraph contained in the Particulars of Claim, in isolation. I am of the opinion that this type of conduct constitutes a severe abuse of process and a gross wastage of the South African Courts' already limited

[1]In the case of allegedly Vague and Embarrassing papers

[2]In the case of "No Cause of Action" allegedly being sustained by the papers

[3]South African Uniform Rules of Court, Rule 23(3)

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time and resources.

1.2. Legal Aspects Relating to Pleadings in General

Rule 22(2) of the South African Uniform Rules of Court stipulates that:
"The Defendant shall in his Plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies."

1.3. Legal Aspects Relating to Exceptions in the High Court

Rule 23(1) of the Uniform Rules of Court stipulates that:

> *"Where any pleading is vague and embarrassing... the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto. ..Provided that where a party intends to take an exception that a pleading is vague and embarrassing, he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days..."*

In considering an exception, a Court commences from the premise that the allegations contained in the Particulars of Claim are correct, and then considers the pleadings as a whole. No facts outside those contained in the pleadings can be brought into issue. An Excipient will have to show that the pleading is excipiable on every possible interpretation that can reasonably be attached to it[4], wherefore the onus rests upon the Excipient.

The purpose of an Exception is to dispose of the case in whole or in part. An exception on the grounds that the pleadings are vague and embarrassing is not directed at a particular paragraph in the Particulars of Claim but goes to the whole cause of action, which must be shown to be vague and embarrassing[5] to justify the relief sought.

It is important to deal with the applicable principles in an Exception, as stated in ***Erasmus, Superior Court Practice***[6]:

> "*(a) In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning. To put it at its simplest; the reader must be unable to distil from the statement a clear, single meaning.*
>
> *(b) If there is vagueness in this sense, the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him or her by the vagueness complained of.*
>
> *(c) In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.*
>
> *(d) The ultimate test as to whether or not the exception should be upheld is whether the Excipient is prejudiced.*
>
> *(e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amount to prejudice.*
>
> *(f) The Excipient must make out his or her case for embarrassment by reference to the pleadings alone.*
>
> *(g) The Court would not decide by way of Exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness."*

An Exception that a pleading is vague and embarrassing, strikes at the formulation of the cause of action, and not its legal validity[7]. In dealing with Exceptions that pleadings are vague and embarrassing, courts have held that such an Exception can only be taken when the vagueness and embarrassment strikes at the root cause of the action as pleaded[8] and such Exception will not be allowed unless an excipient will be seriously prejudiced if the offending

[4]Theunissen & andere v Transvaalse Lewendehawe Koöp BPK 1988 (2) SA 493 (A) at 500E-F; First National Bank of Southern Africa Limited v Perry N.O. & others 2001 (3) SA 960 (SCA) at 965C-D.

[5]Jowell v Bramwell-Jones & others 1998 (1) SA 836 (W) at 899F-G

[6]At B1 154 to B1 154A

[7]Trope & others v South African Reserve Bank 1993 (3) SA 264 (A) at 269I-J

[8]See Jowell supra at 902F-G; Factory Investments (Pty) Ltd v Record Industries Ltd 1957 (2) SA 306(T)

allegations are not expunged[9].

An Exception that a pleading is vague and embarrassing should not be directed at a certain paragraph of the pleading but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing[10]. ***Jowell v Bramnell Jones and Others***[11] states as follows:

> "*I must first ask whether the Exception goes to the heart of the claim and, if so, whether it is vague and embarrassing to the extent that the Defendant does not know the claim he has to meet..."*

In deciding on Exceptions based on Vagueness and Embarrassment, our Courts have over the years, ultimately held that the following are the considerations, namely:

a) the onus is on the Excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice[12];

b) whether or not the exception should be upheld is whether the Excipient is prejudiced[13];

c) the Excipient must make out a case for embarrassment by reference to the pleadings alone[14].

It must also be borne in mind what is stated in Rule 18(4)[15], which requires that every pleading *"shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim... with sufficient particularity to enable the opposite party to reply thereto."*

It must also not be forgotten that the object of pleadings is to define the issues between the parties. In ***Odgers Principles of Pleading and Practice in Civil Actions in the High Court of Justice***[16] it is stated as follows:

> *"The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be obtained when each party states his case with precision."*

The object of pleading is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise[17]. Pleadings must therefore be lucid and logical and in an intelligible form and the cause of action or defence must clearly appear from the factual allegations made. The Particulars of Claim should be so phrased that the Defendant may reasonably and fairly be required to plead thereto[18].

When an exception is taken on the ground that the pleading is vague and embarrassing, the consideration that courts should deal with the exception sensibly and not in over-technical manner does not apply, because an exception may be taken to protect oneself against embarrassment[19].

"the pleading must be vague and embarrassing on every possible interpretation thereof.."

The vagueness must however go to the root of the matter and save for an instance where the Exception is taken for purpose of raising a substantive question of law which may have the effect of a the dispute between parties, an Excipient should make out a very strong case before he should be allowed to succeed. The Excipient must therefore satisfy the Court that it would be seriously prejudiced if the offending pleading were allowed to stand[20].

Where the Excipient relies on the ground that the pleading is vague and embarrassing the enquiry involves a two-fold consideration, namely whether the pleading lacks particularity to the extent that it is vague and, if so, whether the vagueness causes embarrassment of such a nature

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[9]Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298A-B; and Gallagher Group Ltd & another v IO Tech Manufacturing (Pty) Ltd & others 2014 (2) SA 157 (GNP) at 166G-H

[10]Autopack Distributors CC v Compendium Insurance Group (Pty) Ltd (9935/2014) [2015] ZAKZDHC 60 (7 August 2015)

[11]1998 (1) SA 836 (W) at 905E-H

[12]Theunissen & andere v Transvaalse Lewendehawe Koöp BPK 1988 (2) SA 493 (A)

[13]Trope v South African Reserve Bank & another and Two Other Cases 1992 (3) SA 208 (T) at 211B- C

[14]Deane v Deane 1955 (3) SA 86 (N) at 87(F)-G

[15]South African Uniform Rules of Court

[16]22nd Edition at page 113

[17] Absa Bank Limited v Mocke (1324/2016) [2017] ZAFSHC 97 (15 June 2017)

[18]Trope v South African Reserve Bank and Another and Two Other Cases 1992 (3) SA 208 (T) at 210G - 211E

[19]General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd 1944 AD at 454; Wilson v South African Railways and Harbours 1981 (3) SA 1016 (C) at 1019C.

[20]Francis v Sharp and Others 2004 (3) SA 230 (C)

that the excipient is prejudiced[21]. In ***Trope***[22] *supra* the Court held that the ultimate test is still whether the pleading complies with the requirements of Rule 18(4).

The hard and fast rule relating to Exceptions is further that, in order for an Exception to succeed, the pleading must be excipiable on each and every possible interpretation that can be reasonably attached to it[23].

A pleading may be vague if it fails to provide the degree of detail necessary in a particular case properly to inform the other party of the case being advanced[24]. The typical prejudice which justifies an exception is if the allegations in the particulars of claim are such that the Defendant is unable to plead properly[25]. In order to answer this question, the Court is "*obliged to undertake a quantitative analysis of such embarrassment as the Excipient can show is caused to him, in his efforts to plead to the offending paragraph, by the vagueness complained of*"[26].

The evaluation of prejudice is a factual enquiry, and is a question of degree. The decision must necessarily be influenced by the nature of the allegations, their content, the nature of the claim and the relationship between the parties[27].

2. Case Law

The onus is on the Excipient to show both the vagueness and the prejudice and must do so within the ambit of the pleadings. In ***Nxumalo v First Link Insurance Brokers (Pty) Ltd***[28] the Court held as follows:

> *"[6] The onus is of course on the excipient to show both vagueness amounting to embarrassment and to embarrassment amounting to prejudice. Where the excipient relies on embarrassment, such must be demonstrated by having regard to the pleadings only. The attack must arise from within the four walls of the pleading which is the source of the complaint and what is more, such embarrassment must not be frivolous, it must be substantial. See in this regard* ***Lockhat and Others v Minister of the Interior 1960 (3) SA 765 (D) at 777B - H****. Therefore, the ultimate test on whether an exception should be upheld is whether the excipient is prejudiced. In this regard see for instance* ***Levitan v Newhaven Holiday Enterprises CC*** *1991 (2) SA 297 (C) at 298A - J.*"

Where Exceptions are brought on the basis that no cause of action is disclosed in the pleadings, it was stated in ***McKelvey v Cowan NO***[29] that:

> "*It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action."*

In ***Frank v Premier Hangers CC***[30]*,* Griesel J stated as follows at para [11] page 600:

> *"In order to succeed in its exception, the plaintiff* [Excipient] *has the onus to persuade the court that, upon every interpretation which the defendant's* [Respondent] *plea and counter-claim* [Particulars of Claim] *can reasonably bear, no defence or cause of action is disclosed. Failing this, the exception ought not to be upheld."* [own insertion]

It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law[31].

An exception is generally not the appropriate procedure to

[21] Trope v South African Reserve Bank 1993 (3) SA 264 (A) at 268F; Quinlan v McGregor 1960 (4) SA 383 (D) at 393E – H.

[22] Trope v South African Reserve Bank and Another and Two Other Cases 1992 (3) SA 208 (T)

[23] Picbel Groep Voorsorgfonds v Somerville, Sable Industries Ltd v Nash and Others, Mitchell Cotts Pension Fund and Another v Nedbank Ltd and Another , Datakor Pension Fund and Others v Wynne-Jones & Company Employee Benefits Consultants (Pty) Ltd and Others (2011/16213, 2011/16214, 2011/16215, 2011/16216) [2012] ZAGPJHC 48 (30 March 2012)

[24] Lockhat v Minister of Interior 1960 (3) SA 765 (D) at 777D; Nasionale Aartappelkooperasie Bpk v Price Waterhouse Coopers 2001 (2) SA 790 (T) at 797J - 798A

[25] Lockhat v Minister of Interior 1960 (3) SA 765 (D) at 777E

[26] Quinlan v McGregor 1960(4) SA 383 (D) at 393F-G

[27] ABSA Bank Ltd v Boksburg Transitional Local Council 1997 (2) SA 415 (W) at 422A

[28] 2003 (2) SA 620 (T)

[29] 1980 (4) SA 383 (D) at 393F-G

[30] 2008 (3) SA 594 (C)

[31] Vermeulen v Goose Valley Investments (Pty) Ltd 2001 (3) SA 986 (SCA) at 997

settle questions of interpretation because, in cases of doubt, evidence may be admissible at the trial stage relating to surrounding circumstances which evidence may clear up the difficulties[32].

In the case of ***MN v AJ***[33] relying on ***Suid Afrikaans Oderlinge Brand – en Algemene Versekeringsmaatskappy Bpk v Van der Berg en 'n Ander***[34] ,where the Court held:

> "*[24] While pleadings must be drafted carefully a court should not read them pedantically nor should it overemphasize precise formalistic requirements; the substance of the allegations should be properly considered.*"

3. The New Dispensation – The July 2019 Amendment of the Uniform Rules of Court

On the 31st day of May 2019, the amended Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal (SCA), the High Court, as well as the Magistrates' Courts were published[35]. All of these amendments came into force on the 1st day of July 2019.

There have been some substantial amendments which, in my opinion, are going to change the face of legal practice in South Africa. The Magistrates' Court Rules now include a provision[36] that, if the Exception is not enrolled within 10 days after delivery thereof, the Exception will lapse. I believe that this provision is going to play a vital role in deterring litigants from using Exceptions as a delaying tactic.

Unfortunately, Rule 23 of the Uniform Rules of Court, has not seen a similar amendment, however Rule 32 has been substantially amended, in that a Plea now precedes Summary Judgment, which will now allow the High Court to have a fuller picture of the defence of the Defendant. It will also stop the practice of Plaintiffs applying for Summary Judgment, in order to get the Defendant's version on paper, and under oath.

The amendment will unfortunately not in any way, force litigants to rather avail themselves of the existing provisions contained in Rule 35(14), in order to obtain the relevant information in order to allow them to plead, instead of delivering an Exception.

I believe that, unless the Legislature amends Rule 23 of the Uniform Rules of Court, along the same lines of Rule 19 of the Magistrates' Court Rules, there will be opportunistic litigants that will continue to use the Exception process in the High Court as a delaying tactic, which is not in the interest of justice, and will definitely have the effect of further backlogs and congestion of the rolls of the South African Courts.

Whether the new amendment will have the effect of delaying Summary Judgment, is a topic of debate for another day...

[32]Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 (1) SA 508 (A)

[33]2013 (3) SA 26 (WCC)

[34]1976 (1) SA 602 (A) at 607E.

[35]GN R842 GG42497/31-5-2019

[36]Rule 19 of the Magistrates' Court Rules