

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, EAST LONDON)**

CASE NO. EL 1269/2020

In the matter between:

BUSINESS CONNECTION (PTY) LTD

Plaintiff/Respondent

and

BUFFALO CITY METROPOLITAN MUNICIPALITY

Defendant/Excipient

JUDGMENT

GQAMANA J:

[1] For convenience, parties shall be referred to as cited in the main action. The plaintiff, Business Connection (Pty) Ltd, caused summons to be issued against the defendant, Buffalo City Metropolitan Municipality, for payment of its invoices in the sum of R15 864 539.80. History aside for the moment, the case pleaded by the plaintiff in the amended particulars of claim is that:¹

1.1 on or about 16 April 2016, alternatively 21 October 2016, the parties concluded a written Financial Information Management System Master Agreement (“the first Master Agreement”).² The terms of the first Master Agreement are reproduced at paragraphs 5.1 to 6.7 of the amended particulars of claim.

1.2 on or about 6 November 2017, the parties further concluded a written Service Level Agreement (SLA) for the provisioning of IT software and services required to upgrade, enhance and support the defendant’s Solar System and the

¹ Index Part III pp 544-558.

² Index Part III pp 559-677, annexure POC 1.

Municipal Standard Chart of Accounts (mSCOA).³ The SLA was for the period from 1 March 2018 to 28 February 2019. The SLA also contained a renewal or extension provision for a further period as maybe agreed between the parties. The material terms of the SLA are also reproduced in the amended particulars of claim at paragraphs 8.1 to 8.8.

- 1.3 on 5 February 2018, a first request was issued by the defendant for resources in terms of the SLA in order to assist the defendant in the mSCO A phase 2 project. The request was for a business analyst, a data base administrator, two project administrators and two network administrators. The plaintiff accepted and executed the first request. The rates of payment for such services was based on the tariffs as stipulated in the SLA.
- 1.4 on 21 January 2019, the parties concluded another written Master Agreement (“the second Master Agreement”).⁴ The terms of the second Master Agreement are also reproduced at paragraphs 14.1 to 15.4 of the amended particulars of claim.⁵
- 1.5 on 24 January 2019, the defendant issued two requests to the plaintiff, both subject to the Master Service Agreement and the SLA Schedule Amendment (“the second request”). The requests were for the extension of certain resources whose deployments were due to end in February 2019. The aforesaid services were those that were requested in terms of the first request of 5 February 2018 referred to in sub-paragraph 1.3 above. The other request was for additional resources for a period of 12 months from 1 February 2019 to 31 March 2020. The plaintiff accepted and executed the second request.
- 1.6 on or about 31 January 2019, arising from the second request, parties concluded a written contract schedule (“the Schedule”).⁶ The terms of the schedule are reproduced at paragraph 20.1 to 20.3 of the amended particulars of claim.
- 1.7 the plaintiff complied with its obligations in terms of the first request and the second request which were issued in terms of the SLA and has invoiced the

³ Index Part III pp 678-690.

⁴ Index Part III pp 692-706.

⁵ Index Part III pp 551-553.

⁶ Index Part III pp 709-711 annexure “POC6”.

defendant for the services rendered, however the defendant failed to make payment. It is accordingly contended that the defendant is indebted to the plaintiff in the amount of R15 864 539. 80.

[3] The defendant delivered a notice in terms of rule 23(1)(a) of the Uniform Rules of Court. The plaintiff did not remove the cause of complaint, instead it filed its amended particulars of claim.

[4] In response to the plaintiff's amended particulars of claim, the defendant delivered a notice of exception on 24 June 2021. The defendant's exception is based on the grounds that the amended particulars of claim lacks averments which are necessary to sustained a cause of action. The defendant's complaints are that:

- “1. in paragraph 9 to 12 of the amended particulars of claim the plaintiff in effect pleads the existence of a contract between the parties, but has failed to comply with the peremptory provisions of rule 18(6) of the Uniform Rules of Court which require a party who relies upon a contract in its pleading to state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written, to annex a true copy thereof or the part relied upon in the pleading;
2. in paragraphs 16 and 17 of the amended particulars of claim the plaintiff in effect pleads the existence of two contracts between the parties but, in respect of the first contract it has failed to comply with the peremptory provisions of rule 18(6) of the Uniform Rules of Court...”

[5] The issue now before me is solely whether the exception are to be upheld or dismissed with costs.

[6] As a point of departure, the object of a summons is to inform the defendant of the nature of the claim it is required to meet and the cause of action must be disclosed in the particulars of claim.⁷ A cause of action must appear from the factual averments made

⁷ *Makgae v SentraBoer (Kooperatief) Bpk* 1981 (4) SA 239 (T) at 244 B – 245C.

in the particulars of claim. In *Mckenzie v Farmers Cooperatives Meat Industries Ltd*,⁸ the court defined “cause of action” as follows:

“... every fact which it would be necessary for the plaintiff to prove, if traversed in order to support his right to judgment of the court. It does not comprised every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

[7] An excipient in order to succeed in its exception must persuade the court that, upon every interpretation which the plaintiff’s particulars of claim can reasonably bear, no cause of action is disclosed, otherwise failing that, the exception must not be upheld.⁹

[8] An exception must be considered on the particulars of claim as it stands, without taking any facts other than those stated there into account, assuming that all the allegations contained therein are true and assess whether it discloses a cause of action.¹⁰

[9] In *Clementz v Millbo Paper CC and Others*,¹¹ the approach to be adopted was summarised as follows:

“In the present instance, I am unable to find on the pleaded facts, which I must accept as correct and which must be benevolently interpreted in favour of the plaintiff, that the plaintiff’s claim is (not may be) bad in law, that the claim is legally hopeless or that no injustice will be done to the exception that the pleadings lack averments which are necessary to sustain an action.”

[10] For the particulars of claim to disclose a cause of action, a plaintiff’s must set out every material fact which it would be necessary for it to prove in order to support its right to judgment. Rule 18(6) of the Uniform Rules of Court requires a party who relies upon a contract, to state whether the contract was in writing or oral and when, where and by

⁸ 1922 AD 16 at 23.

⁹ *Fairoaks Investment Holding (Pty) Ltd and Another v Oliver and Others* 2008 (4) SA 302 (SCA) para [12], *Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd and Others* 2014 (2) SA 157 (GNP) para [20].

¹⁰ *Natal Fresh Produce Growers Association v Agro-serve Pty Ltd* 1990 (4) SA 749 (N) at 755, *Two Oceans Aquariums Trust v Kantey and Templar Pty Ltd* 2006 (3) 138 (SCA) at 143, *Baliso v Firstrand Bank Ltd t/a Westbank* 2017 (1) SA 292 (CC) para [33].

¹¹ 2021 (4) SA 186 (GJ) para [95].

whom it was concluded. If a party relies on a written contract, a true copy thereof or the part relied on in the pleading must be annexed to the pleading.

- [11] Furthermore rule 18(4), states that, every pleading must contain a clear and concise statement of the material facts upon the pleader relies for its claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto. In *Trope v South African Reserve Bank*¹² it was said:

“It is of course, 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 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; the cause of action or defence must appear clearly from the factual allegations made ... ”

- [12] If the exception is that the particulars of claim fails to disclose a cause of action, the test is whether on all possible reading of the facts no cause of action is made out.¹³

- [13] In *Evins v Shield Insurance Co. Ltd*,¹⁴ Trolip JA said that “cause of action” is ordinarily used to describe the factual basis, the fact of material facts, that begets the plaintiff’s legal right of action...”

- [14] In the instant matter both the defendant’s grounds of exceptions are based on the contention that, the amended particulars of claim lacks averments necessary to sustain a cause of action because of non-compliance with the peremptory provisions of rule 18(6). The first complaint is directed at paragraphs 9 to 12 of the amended particulars of claim. The relevant paragraphs read:

“9. On or about 5 February 2018, the defendant issued a request to the plaintiff for resources in terms of the SLA “whom (sic) will assist in the mSCOA phase

¹² 1992 (3) SA 208 (T) at 210 G-I.

¹³ *Astral Operations Ltd v Nambitha Distributors Ltd; Astral Ltd v O’Farrell NO and Others* [2013] 4 All SA 598 KZD para 6, *Louis v Oneante Pty Ltd and Another* 1992 (4) SA 811 (A) at 817, *Francis v Sharp and Others* 2004 (3) SA 230 (C) at 237 D–E.

¹⁴ 1980 (2) SA 814 (A) at 825 G.

2 project" ("the first request"). A copy of the first request is attached is annexure POC3.

10. *The request recorded the defendant's need for a Business Analyst, a Database Administrator, two Project Administrators and two Network Administrators. In terms of the first request, the resources would be "linked Solar BCX contact on a rate based tariffs as stipulated in the SLA "agreement" to that: [S]uch resources will be manned within ICT for 8 hours daily and 5 times a week and such cost would be billable against ICT budget."*
11. *The plaintiff accepted the first request and executed the request by supplying the defendant with the resources requested.*
12. *The defendant accepted the resources at their respective rates and accepted the services provided by the supplied resources."*

[15] The second exception is directed at paragraphs 16 and 17 of the amended particulars of claim. The relevant portions thereof reads:

- "16. *On or about 24 January 2019, the defendant issued two requests to the plaintiff "both subject to the Master Services Agreement and the Service Level Agreement Schedule Amendment ("the second request"). A copy of the second request is attached as "POC 5".*
- 16.1 *The request was for the contract extension of certain resources already deployed pursuant to the first request of 5 February 2018 referred to above. The defendant requested the extension of specific resources whose deployments were due to end in February 2019. The defendant requested that their deployment be extended from 1 February 2019 to 31 March 2020.*
- 16.2 *The second request was for additional resources for a period of 12 months from 1 February 2019 to 31 March 2020 the stated purpose of which was "to ensure that BCMU utilised the same local resources from the mSCOA phase 1 Project in the Phase 2 Project to the completion to ensure business continuity and overall compliance." To this end the defendant requested that the plaintiff provide ...*
17. *The plaintiff accepted the second request. The plaintiff accordingly agreed to extend the term of certain resources supplied in terms of the first request read with the SLA and it agreed to supply the additional resources contemplated in the second request."*

[16] Mr Seape counsel for the plaintiff, argued correctly so, that the defendant is constrained to the two grounds of exceptions as set out in the notice of exception. The crux of them being that, the amended particulars of claim fails to disclose a cause of action. He

argued further that the plaintiff has pleaded a series of agreements namely the SLA, the First and Second Master Agreements and all such agreements were attached to the pleadings. Accordingly, the plaintiff's pleadings comply with the requirements of rule 18 (6).

- [17] It was further argued that, the impugned paragraphs (i.e. paragraphs 9-12 and 16-17)) do not contain allegations that in effect establish the agreements that the plaintiff's claim is based upon, but merely contain allegations that describe the performance that entitles the plaintiff to the relief it seeks. In the alternative, it was argued that, any shortfall in compliance with- the requirements of rule 18(6) could be cured by a request for further particulars.
- [18] The exception raised by the defendant goes to the roots of the plaintiff's claim. The entire case pleaded by the plaintiff is predicated on the first and second requests and the acceptance thereof.
- [19] The claim pleaded is based on the agreements, namely the SLA, the First and Second Master Agreements, read with the requests for services and acceptance of such requests. At paragraph 9 of the amended particulars of claim, the case made up by the plaintiff is that, on 5 February 2018, the first request was issued by the defendant for services in terms of the SLA and such request were accepted and executed. The first hurdle for the plaintiff in respect of that claim is that, the SLA only commenced on 1 March 2018.¹⁵ The defendant therefore could not have issued the first request in terms of the SLA-because the SLA had not come into existence by then. Furthermore the specificity pleaded in paragraphs 9 and 10 are also not set out in the SLA being the agreement the plaintiff relies upon as its contractual basis upon which the request was issued by the defendant.

¹⁵ Part III p 547 paragraph 8.2 of the amended particulars of claim.

[20] The second problem, the plaintiff's case is that it accepted the requests and executed the terms thereof by supplying the required resources/services and that the defendant accepted the services at the respective rates. However, there are no facts as to where, when and by whom such requests were accepted and executed on behalf of the plaintiff. Neither are there any facts pleaded as to where, when and by whom such services were accepted on behalf of the defendant. These are facts, which are peremptory in terms of rule 18(6).

[21] With regard to the complaint about paragraphs 16 and 17 of the amended particulars of claim, the case pleaded is that, a second request was issued by the defendant, accepted and executed upon by the plaintiff. However, no facts pleaded as to who made the requests or about the identities of persons who accepted the requests on plaintiff's behalf.

[22] In summary, the plaintiff entire case is predicated on the contentions that certain requests were made, which were accepted and executed by it and the defendant failed to pay for such services rendered. Clearly, its claim is based on contracts or agreements and the peremptory provisions of rule 18(6) must be complied with in order for the plaintiff's particulars of claim to disclose a cause of action. In *Mckenzie* (supra), a cause of action is "*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court it does not comprise every piece of evidence which is necessary to prove each fact, but every fact which necessary to be proved.*" Because the plaintiff relies upon contracts for its claims, it must plead the facts required in rule 18(6). Such facts and information are a vital link in the chain of the plaintiff's cause of action against the defendant. Absent such facts and information, the basis of the plaintiff's cause of action does not appear on the face of the pleadings.¹⁶

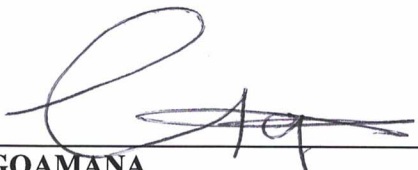
¹⁶ See *Moosa and Others NNO v Hassam* 2010 (2) SA 410 KZP at 413 B-F.

[25] For the foregoing reasons, the plaintiff's amended particulars of claim are excipiable in that, it lack averments necessary to sustain a cause of action.

[24] On the issue of costs, *Mr Seape* argued that the matter was not complex as to allow for employment of two counsel. In exercising my discretion and more importantly having, regard to the limited basis upon which the defendant's exception hinges on and the issues, which were argued before me, I am not persuaded that the employment of two counsel was unnecessary.

[25] In the circumstances, the following order shall be issued:

1. The defendant's exception is upheld with costs.
2. The plaintiff is afforded a period of 15 days from the date of this order to deliver its amended particulars of claim.



N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : *Adv J C Heunis SC with Adv F T Pretorius*

Instructed by : C/o IC Clark Attorneys
East London

Counsel for the Respondent : *Adv M Seape*

Instructed by : Clark Laing Attorneys
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Date heard : 18 November 2021

Date judgment delivered : 25 January 2022