IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION

CASE NO. EL753/2018

In the matter between:

MAYIBUYE TRANSPORT CORPORATION Plaintiff/Respondent

and

BUSINESS CONNEXION (PTY) LTD Defendant/Excipient

JUDGMENT

STRETCH J.:

[1] The defendant excepts to the plaintiff's summons on 11 grounds that it is vague and embarrassing; alternatively, that it lacks averments which are necessary to sustain an action, purportedly in terms of rule 23(1) of the Uniform Rules of this court. I will traverse and dispose of each ground seriatim:

a. The first ground

It is alleged that the plaintiff has been cited as a juristic person established in terms of the Ciskei Corporations Act 61 of 1981. Because this act no longer exists, the plaintiff's *locus standi* is in question, and

as such, the claim fails to disclose a cause of action. I do not agree. The plaintiff has averred that it is a corporation and that it is a juristic person. To my mind, these averments are sufficient to establish legal standing. The defendant is at liberty to deny the averments. The invalidity of a statute as a defence should, in any event, as a matter of course be raised by way of a plea or a special plea. The first ground falls to be dismissed.

b. The second ground

The defendant claims that because the plaintiff has failed to state where the agreement on which it relies was entered into, it is unaware of the nature of the agreement on which the plaintiff relies. In support of this contention, the defendant purports to rely on rule 18(10), which in essence deals with damages for personal injury. The relevant sub-section as far as pleading is concerned, is rule 18(6), which states that a party relying on a contract shall state whether the contract is written or oral, and when, where and by whom it was concluded. The sub-section also states that if the contract is a written one, a true copy thereof or the part relied on shall be annexed to the pleading. The plaintiff has, prima facie, complied with the substance of rule 18(6) by annexing a copy of the agreement to its claim. This discloses that an agreement was entered into at Midrand on 19 October 2016. In paragraph 5 of its claim the plaintiff discloses when the agreement was entered into, and by whom the parties were represented at the time. It is pleaded that this was done in contemplation of a letter of award in terms of which the plaintiff, on 19 August 2016, appointed the defendant to deliver specified goods and services to the plaintiff. These averments are not vague and embarrassing. The second ground falls to be dismissed.

c. The third ground

The plaintiff has pleaded that the agreement was concluded in October 2016. This is evident ex facie the copy of the agreement annexed to the claim. The plaintiff further pleaded that it was a material condition of the agreement that the contract would commence a month earlier. It is averred that it does not appear ex facie the claim, whether the contract and the agreement are the same thing, and that if they are the same, whether the contract was intended to apply retrospectively. On the other hand, it is contended on the plaintiff's behalf that on a proper construction of the particulars of claim as a whole, it is clear that the plaintiff relies on the service level agreement annexed to its claim. I am not inclined to agree. The defendant is entitled to understand why the plaintiff introduced 14 September 2016 in its particulars of claim, when the defendant was allegedly appointed on 19 August 2016, and when the parties entered into the service level agreement on 19 October 2016.

An exception that a pleading is vague and embarrassing is intended to cover the case where, although a cause of action appears in the summons, there is some defect in the manner in which it is set out, which results in embarrassment to the defendant.[1] Averments in a pleading which are contradictory (as in the matter before me), and which are not pleaded in the alternative, may well be construed as vague and embarrassing.[2] The particulars read together with the annexed agreement are at the very least vague in that they are capable of more than one meaning.[3] Simply stated, any reader of the claim together with

[1] See *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 268F
[2] *Trope* above at 211E
[3] See *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 812H

the agreement will not be able to distill from these documents a clear, single meaning. I am satisfied that the commencement date of the contract is a relevant term thereof, and that the defendant may well be prejudiced if it is not clarified. I say this, because the plaintiff has alleged in its claim that the defendant has "admitted" the terms of the agreement including its obligation to supply the plaintiff with fully licenced software "for a period of three years". It is accordingly of particular significance that the ambiguity regarding the commencement of the running of the three year period is clarified.[4] The third ground serves to be upheld.

d. <u>The fourth ground</u>

The plaintiff has pleaded that a material term of the agreement was that the defendant (which should presumably read the plaintiff), would pay all monies due from time to time as and when the defendant requested it to do so. The defendant avers that it is not clear what money is referred to. I do not agree. The service level agreement provides for payment by the plaintiff for all support costs "at the agreed interval". Clause 8 of the agreement deals fully with consideration and payment terms. An agreement which may be awkward to decipher (which may or may not be the position in the case before me), should not be construed as making out a case that the pleadings are vague and embarrassing, or that they fail to make out a cause of action.[5] The fourth ground of exception falls to be dismissed.

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[4] See *Horwitz v Hendricks* 1928 AD 391

[5] See for example the reasoning in *Francis v Sharp* 2004 (3) SA 230 (C) at 240F-G

e. The fifth ground

The plaintiff has pleaded that all licences in respect of the software for the infrastructure provided would be paid by the defendant, and that all software provided would be licenced for three years. According to the defendant, the identity of the licence provider(s), the manner in which licences were to be provided, the amounts to be paid, the identity of the payee(s), the due date(s) for payment, and the basis for the defendant's obligation to pay, are issues which are not a model of clarity, and as such, the pleading is vague and embarrassing.

To my mind this information is not required in order for the defendant to plead. The pleading contains sufficient particularity to enable the defendant to plead thereto as required by the provisions of rule 18(4). The fifth ground likewise has no merit.

f. The sixth ground

The plaintiff has made an averment that it has complied with all its obligations in terms of the contract, including paying all monies due to the defendant in accordance with and in terms of the contract. The defendant holds the view that because the plaintiff is relying on breach of contract, it must set out the material terms of the contract, how it has performed in terms thereof, and to what extent the defendant is guilty of non-performance. In particular, the defendant contends that the basis for averring that it was owed money, when and to whom the plaintiff paid this money, the individual amounts that were paid, and whether the defendant performed in part and was thus paid in part, or whether the defendant performed in full and was thus paid in full, has not been

clarified. In the circumstances, so it is alleged, the plaintiff has not adequately set out its performance in terms of the contract, and the claim accordingly lacks sufficient particularity to enable the defendant to plead to it.

Once again I do not agree. The paragraph which forms the subject matter of this ground of exception, reads as follows:

'The material terms of the agreement relevant to the issue were that .....

All licences in respect [in respect] of the software for the infrastructure provided would be paid by the defendant and all software provided will [be][6] licenced for a period of three years.'

Clause 4.4 of the annexed agreement deals fully and comprehensively with everything required of the plaintiff, including the making of payments at agreed intervals. Clause 5 of the agreement deals fully and comprehensively with all issues pertaining to the licencing of software and the fact that the plaintiff, as the client, is liable to the defendant (the service provider) for all associated licence fees. Clause 8 of the agreement covers issues pertaining to consideration and payment terms. Annexure A to the agreement sets out the specific services to be provided by the defendant to the plaintiff under the agreement. In particular, clause 12 thereof states that the defendant will "subscribe and on-board" the plaintiff with 140 user licences for Microsoft Office 365 E3 SKU on a three year subscription plan. Thus the plaintiff has simply repeated a material term of the annexed contract in its particulars of claim. I fail to understand on what basis the defendant maintains that

[6] The word "be" has been inserted for purposes of this judgment only.

it cannot agree or disagree that this is indeed a material term. This ground of exception likewise, falls to be dismissed.

g. The seventh ground

In paragraph 8 of its claim, the plaintiff makes the following averment:

'The defendant has failed alternatively neglected further alternatively refused to comply with all its obligations in terms of the contract in that the defendant has failed to ensure that the software supplied by it [is][7] licensed *in terms of the requirement of the licensor*[8].'

The defendant has pointed out that the plaintiff has failed to identify the licensor and the licensor's requirements, whether there was an agreement with this licensor and if so, what the terms of the agreement were, to enable the defendant to plead to the averment that the software was not licenced according to specific terms. I am inclined to agree. The term "licensor" has not been defined or referred to anywhere in the agreement or the annexure thereto. Nor has it been used elsewhere in the pleadings to assist the defendant to determine the identity of this entity. This vagueness and embarrassment strikes at the root of the plaintiff's cause of action as pleaded, and the ground of exception accordingly serves to be upheld. It goes without saying that if the licensor and the plaintiff are the same entity, the plaintiff need go no further than to make this averment. However, if the licensor happens to be another entity, the plaintiff must state what the "requirement of the licensor" is, in order for the defendant to plead.

[7] Inserted for completeness for purposes of this judgment only.
[8] Emphasis added.

h. The eighth ground

The plaintiff, in its claim, has made the following averment:

' ... the Defendant has *admitted*[9] [the][10] terms of the agreement including its obligation to supply the Plaintiff with fully licenced software Microsoft Office for a period of three years.'

The defendant alleges that the plaintiff has not indicated when this admission was made. It is trite that the onus is on the defendant as the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. Annexed to the claim is an agreement purportedly entered into between the parties. It seems to me that the plaintiff has used the word "admitted" somewhat loosely to mean "agreed" (in terms of the agreement). Whether that is so, remains a question of interpretation. The use of the term does not however, render the pleading excipiable. The defendant is at liberty to supplement its plea by way of a simple explanation of its interpretation of the word, should it not wish to pin its colours to the mast in respect of, what seems to me, to be an obvious interpretation. This ground of exception too, must fail.

i. The ninth ground

The plaintiff has claimed R1 804 707,61 from the defendant, alleging that it was constrained to pay this sum in order to procure the software licence which the defendant was meant to procure. The defendant has

[9] Emphasis added.
[10] Inserted for completeness.

alleged that the plaintiff has "failed to create a causal link" between the alleged breach and the damages suffered, in that it has not shown how this amount is computed, where, when and from whom the plaintiff bought the software, and what type of software was purchased. Thus, so it is contended, the plaintiff has not managed to show that there is a link between the procurement of the software and the defendant's indebtedness to the plaintiff. This being the case, so it is argued, the defendant has failed to set out averments necessary to sustain a cause of action, alternatively, the pleading is vague and embarrassing and the defendant would be prejudiced by pleading thereto.

To my mind, it is the defendant which ought to be embarrassed as a result of having attempted to raise an argument so entirely void of substance. I say this for the following reasons. Paragraph 12 of the plaintiff's claim is clear. It says this:

'The defendant is therefore indebted to the Plaintiff in the sum of R1 804 707,61 ... being the costs to the Plaintiff of procuring the requisite software license which the Defendant has failed and/or neglected and/or refused to supply.'

Nothing could be clearer. Should the defendant require further particulars for trial, it is at liberty to invoke the provisions of rule 21 and the rules relating to discovery in due course. The exception stage is not the time for the defendant to complain that it does not have sufficient information for trial purposes.[11] This ground of exception falls to be dismissed.

[11] See *Venter and Others NNO v Barrit* 2008 (4) SA 639 (CPD) paragraph 14

j. The tenth ground

This ground likewise falls to be dismissed. The plaintiff, after having made it clear that it had indeed paid the aforesaid sum for the software licence out of its own coffers, elected to motivate the quantum of this expense by advancing a suggestion that the amount it spent "is based on the costs of a license when purchased in the open market excluding the costs of installation". The defendant now claims that it cannot be determined from a reading of this paragraph whether the plaintiff indeed incurred this cost, and whether this cost was incurred in the open market, and accordingly the pleading is vague and embarrassing.

It is not necessary for this court to restate the obvious. A perfectly clear and unambiguous averment was made that the plaintiff expended a specific amount which was for the defendant's account. Should the defendant have no knowledge of the price of such a licence in the open market, it is quite at liberty to say so.

k. The 11th ground

The plaintiff has claimed interest at the legal rate. The defendant has raised a spurious ground of exception that the plaintiff has failed to disclose what the legal rate is. Mercifully this ground was not pursued in the defendant's heads of argument or from the bar. I need say no more.

[2] The plaintiff has been substantially successful in resisting the defendant's extraordinary claims purportedly raised under the auspices of rule 23. I see no reason why costs should not follow the result.

ORDER:

(i) The first, second, fourth, fifth, sixth, eighth, ninth, tenth and 11th grounds of exception as set forth at pages 38 to 45 of the indexed papers are dismissed.

(ii) The third and seventh grounds of exception as set forth at pages 39 and 42 of the indexed papers are upheld.

(iii) The plaintiff is granted leave to substitute the date of 14 September 2016; alternatively, to disclose the source of this date, as set forth at paragraph 6.2 of its particulars of claim, within ten days of delivery of this judgment.

(iv) The plaintiff is granted leave to supplement paragraph 8 of its particulars of claim by disclosing the identity of the "licensor" and, if necessary, to state the requirement of the licensor, as envisaged at paragraph 1g of this judgment, within ten days of delivery of the judgment.

(v) The defendant is ordered to deliver its plea within ten days of the delivery of the plaintiff's amended particulars of claim, failing which it will be ipso facto barred.

(vi) The defendant is ordered to pay the costs of the exception.

I.T. STRETCH
JUDGE OF THE HIGH COURT

Date heard: *2 December 2021*

Date of delivery by way of email to the attorneys of record: *27 January 2022*

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