REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 19952/2012

In the matter between:

MOMENTUM GROUP LIMITED Excipient

and

DE WAAL, MARIUS Respondent

In re:

MOMENTUM GROUP LIMITED Plaintiff

and

DE WAAL, MARIUS Defendant

JUDGMENT

DODSON AJ:

[1] The plaintiff in this matter excepts to certain paragraphs of the defendant's plea on the grounds that they do not disclose a defence.

[2] The exception pertains to the first of two claims pursued by the plaintiff against the defendant, each arising from separate agreements. The second claim is not relevant to the exception.

[3] In respect of the first claim, the plaintiff sues the defendant for repayment of certain commissions. The commissions were allegedly advanced to the defendant before they fell due to him. The defendant allegedly became liable to repay them to the plaintiff on account of the lapse or termination of the policies in respect of which the commission was to become payable.

[4] In the particulars of claim it is alleged that the plaintiff and the defendant entered into a "financial planner agreement". In terms of the agreement the defendant was appointed by the plaintiff as an independent contractor to canvass and procure applications for policies and products and to maintain and service such policies and products.[1]

[5] The plaintiff pleaded further that the following were express terms of the financial planner agreement:

[5.1] commission would be paid by the plaintiff to the defendant in respect of such premiums as were actually paid to and received by the plaintiff from policies that the plaintiff issued following upon applications that the defendant had procured and submitted;

[5.2] such commission would be earned and would become payable as and when the plaintiff received and accepted such premiums;

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[1] I will refer to them simply as policies.

[5.3] notwithstanding the above terms of the agreement, the plaintiff was entitled in its discretion to advance to the defendant "*first year commission or renewal commission for any policy before it receives any premiums"*;

[5.4] any amount repayable by the defendant to the plaintiff would be repayable on demand;

[5.5] the plaintiff would be entitled to set off against any liability of the plaintiff to the defendant (whether or not due), any amounts due by the defendant to the plaintiff;

[5.6] the agreement could be cancelled by either party giving the other 14 days written notice;

[5.7] the agreement could be terminated summarily by the plaintiff in the event of material breach by the defendant;

[5.8] in the event of termination of the agreement as a result of a material breach, no further commission would be due or payable by the plaintiff to the defendant.

[6] The plaintiff avers further that –

[6.1] pursuant to the financial planner agreement, and during its currency, the plaintiff advanced to the defendant first year commission and renewal commission for certain policies and products procured and submitted by the defendant before it received any premiums in respect of those policies and products;

[6.2] on 23 May 2011 the defendant notified the plaintiff of his intention to terminate the agreement on 14 days' notice, effective from 7 June 2011;

[6.3] on or about 23 May 2011 and prior to the termination of the financial planner agreement, the defendant materially breached the agreement by entering into an agreement with Discovery Holdings Limited in terms of which he was appointed as an intermediary of Discovery with effect from 1 June 2011;

[6.4] acting pursuant to such breach, on 18 July 2011 the plaintiff summarily terminated the agreement.

[7] Against that background, the core of the plaintiff's claim is then pleaded as follows:

> *"10. During the currency of the Agreement and subsequent to the termination thereof, policies and/or products in respect of which Plaintiff advanced commissions and/or fees as aforesaid lapsed for whatever reason. As a result of such lapse or termination of the policies and/or products the Plaintiff was obliged to recalculate the commission and/or fees advanced in terms of the provisions of the regulations promulgated in terms of the Long-Term Insurance Act. As a result of such recalculation the Defendant became indebted to the Plaintiff for commissions and/or fees which were advanced and which had not vested in the Defendant at date of cancellation or termination of the policies and/or products.*
>
> *11. As a result of the recalculation of the commissions and/or fees advanced the Defendant became liable to the Plaintiff for the amount of R282 844,97 as calculated on 26th March 2012. The reconciliation of the Defendant's commission account from the inception of the agreement in March 2008 until the 26th of March 2012 is annexed hereto marked Annexure 'B'.*
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> *12. The reconciliation indicates commissions and/or bonuses and/or fees advanced, statutory deductions and agreed deductions in respect of insurance, pension, medical aid contributions, actual payments made to the Defendant and commissions and/or fees*

that were reversed as a result of the cancellation and/or termination of the policies and products."

[8] It is this amount of R282 844,97 which then forms the subject matter of the first claim, less an amount of R28 715,04 admitted to be due by the plaintiff to the defendant in respect of legal costs. The net amount of the first claim is accordingly R254 129,93.

[9] The defendant pleaded to the core paragraphs of the plaintiff's particulars of claim as follows:

"4.1 These paragraphs are denied.

4.2 In elaboration of this denial, the defendant pleads as follows:

4.2.1 It is denied that the reconciliation annexed as 'B' to the plaintiff's particulars of claim constitutes an accurate and reliable basis for the calculation of the defendant's purported indebtedness to the plaintiff (such indebtedness which, in any event, is denied).

4.2.2 The plaintiff's interpretation of the agreement (and the reconciliation upon which it relies) fails to take account of the defendant's entitlement to earn commissions on policies in respect of which he has been appointed as financial advisor.

4.2.3 The agreement, as interpreted by the plaintiff, entitles the plaintiff to recover from the defendant commissions paid in the circumstances described in the particulars of claim without obliging the plaintiff to give the defendant credit for commissions earned. If that interpretation is upheld, then the relevant clauses of the agreement relied upon by the plaintiff (but which are not listed in the particulars of claim) constitute penalty clauses as envisaged in section 1 of the Conventional Penalties Act 15 of 1962. The clauses in question provide to the plaintiff a benefit out of proportion to any prejudice suffered by the plaintiff by the termination of the agreement. In the event of the claim not being dismissed, therefore, the sum claimed ought to be reduced in terms of section 3 of the Conventional Penalties Act 15 of 1962.

4.2.4 If the plaintiff's interpretation of the agreement as described in paragraph 4.2.3 immediately above is

upheld, then the agreement is contrary to public policy and unenforceable."

[10] It is these paragraphs of the plea which are targeted by the plaintiff's exception. The amounts claimed, says the plaintiff, are expressly recoverable in terms of the Regulations under the Long-Term Insurance Act No.52 of 1998.[2] In particular the plaintiff relies on regulation 3.5(2)(a)(i)(cc). The plaintiff avers in the exception (but not in the particulars of claim) that regulation 3.5(2)(i)(cc) forms an implied term of the financial planner agreement. Regulation 3.5(2)(i)(cc) reads as follows:

> *"3.5* ***Adjustment and refund of commission.***
>
> *(1) …*
>
> *(2)(a) If a premium or any part thereof is –*
>
> *(i) for any reason refunded by the long term insurer or, in the case of a multiple premium policy which is not –*
>
> *(aa) …*
>
> *(cc) a policy in respect of which commission has been paid only after each premium in respect of which it has been received by the long term insurer concerned (including but not limited to a replacement policy),*
>
> *for any reason not paid on its due date, including that the policy has been made paid-up or surrendered, but excluding termination upon a health event, a disability event or the death of the life insured, during the first two premium periods in the case of a policy referred to in items 1.1, 2.1, 3.1 and 5.1 of the Table, the commission payable in terms of this Part shall be recalculated by reference to the scale and shall not exceed the percentage of maximum commission in column A or B, respectively, and any amount of commission which has already been paid in excess of the*

[2] Government Notice R1492 of 27 November 1998 contained in Government Gazette No. 19495, as amended by GNR.197 dated 1/3/2000 contained in GG20934, GNR.164 dated 15/2/2002 contained in GG23105, GNR.1209 dated 29/7/2003 contained in GG25370, GNR.1218 dated 1/12/2006 contained in GG29446, GNR.186 dated 1/3/2007 contained in GG29681; GNR.952 dated 5/9/2008 contained in GG31395 and GNR.1077 dated 23/12/2011 contained in GG34877.

> *commission as so recalculated, shall be reversed by the long term insurer and refunded to it by the person to whom it was paid: [then follows the Table] "*

[11] In these circumstances, argues the plaintiff, there being no forfeiture of any commission actually vested in the defendant and the claim being authorised by the regulation, there can be no suggestion that there is any penalty as contemplated in the Conventional Penalties Act, nor can there be any suggestion that the agreement is contrary to public policy.

[12] The plaintiff alleges further in its exception that "*the Defendant's contention that the Plaintiff's failure and/or refusal to give credit to the Defendant for commissions earned or the Defendant's entitlement to such commissions cannot and does not affect the Defendant's obligation to repay commissions advanced to the Defendant prior to receipt of the premiums in respect thereof in accordance with the regulations as set out above, which regulations constitute implied terms of the financial planner agreement."*

[13] As its starting point in opposing the exception, the defendant argues that the exception is entirely based on it being accepted that the regulation is an implied term of the financial planner agreement. He goes on to argue that it is inappropriate for a court to decide questions of contractual interpretation on exception.[3] He argues that on this basis alone, the exception should be dismissed. However, the last of the authorities relied on by the defendant

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[3] See *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 186J; *Francis v Sharp & Others* 2004 (3) SA 230 (C) at 237F – G; *Pete's Warehousing and Sales CC v Bowsink Investments CC* [2000] 2 All SA 266 at para 14.

shows that courts are not invariably averse to deciding on exception whether a contract incorporates an implied term.

[14] In my view there is an anterior difficulty with the plaintiff's reliance in the exception, on the regulations. The only reference to the regulations in the particulars of claim is that contained in paragraph 10.[4] There, they are not pleaded as an implied term of the agreement. The only express reference to there being an implied term is in the exception. At the time that the defendant pleaded to the particulars of claim, there was no averment that the regulations formed an implied term of the agreement.

[15] It seems to me that before the plaintiff can except to a plea on the basis that it does not raise a defence to a claim based on an implied term, the implied term must have been pleaded as such in the particulars of claim, not in the exception.

[16] The second basis upon which the defendant resists the exception is the principle which was stated by Van Winsen J in *Miller & Others v Bellville Municipality*[5] as follows:

> *"An exception founded upon the contention that a plea lacks the averments necessary to sustain a defence is designed to obtain a decision on a point of law which will dispose of the case in whole or in part. If it is not to have that effect the exception should not be entertained…"*

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[4] See para 7 above.

[5] 1971 (4) SA 544 (C) at 546D.

[17] To assess this argument, it is necessary to analyse the pleadings. In this regard it is significant that, through the denials contained in paragraphs 4.1 and 4.2.1 of the defendant's plea, the defendant places the following averments by the plaintiff in issue:

[17.1] that during the currency of the agreement and subsequent to its termination, policies in respect of which the plaintiff had advanced commissions to the defendant had lapsed;

[17.2] that as a result of such lapse the plaintiff was obliged in terms of the regulations to recalculate the commission advanced;

[17.3] that as a result of such recalculation, the defendant became indebted to the plaintiff for repayment of the commissions advanced;

[17.4] that the reconciliation annexed to the plaintiff's particulars of claim as annexure "B" was accurate; and

[17.5] that the defendant was indebted to the plaintiff.

[18] On the basis of those denials, the defendant has done enough to join issue with the plaintiff and require it to lead the necessary evidence to prove its claim in all the above respects in which the averments in the particulars of claim are denied.

[19] The pleas based on the Conventional Penalties Act and public policy that follow in paragraphs 4.2.3 and 4.2.4 are supplementary to the denials contained in paragraph 4.1 and 4.2.1 of the plea. They are not pleaded in the form of a

confession and avoidance. If the defendant had admitted that policies or products in respect of which commission had been advanced had lapsed and that the reconciliation was accurate, the defendant would have been reliant on the defences based on the Conventional Penalties Act and on public policy as its sole bases for resisting the plaintiff's claim. Then an exception would clearly have been appropriate. However, this is not the case. They will therefore not dispose of the case.

[20] The test for determining whether or not the exception will dispose of a part of the case is apparent from the decision of Botha J in *Marais v Steyn en 'n Ander*[6] where the court held as follows:

> *"… die basiese doel en funksie van 'n eksepsie in ons prosesreg … is om 'n einde te maak aan die saak, of 'n afsonderlike deel van die saak, wat die aanbieding van onnodige getuienis sal uitskakel."*

[21] The defences in respect of which the exception is raised, will in my view largely be founded upon legal argument flowing from the evidence led in support of and against the defendant's alleged indebtedness in terms of the reconciliation. That evidence will have to be led regardless of the impugned defences. For this reason too, I am not satisfied that the exception will dispose of a substantial part of the case.

[22] In any event, even if the exception is to be construed as potentially disposing of a substantial part of the case, I am not persuaded that it does so. If a pleading is ambiguous, an exception (on the grounds of failure to disclose a defence) will

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6 1975 (3) SA 479 (T) at 486H – 487A.

succeed only if the pleading is excipiable on any of its possible interpretations.[7] The plaintiff's criticism of the impugned defences is that they are directed at resisting repayment of amounts which have not vested in the defendant and could therefore not constitute a penalty or a forfeiture, nor could they be contrary to public policy. That is certainly one meaning which can be ascribed to the relevant paragraphs of the plea and may well render them excipiable.

[23] However, the relevant paragraphs are in my view open to another interpretation. The defendant pleads –

[23.1] in paragraph 4.2.2 that both the plaintiff's interpretation of the agreement and, importantly, the reconciliation, *"fail to take account of the defendant's entitlement to earn commissions on policies in respect of which he has been appointed as financial advisor"*; and

[23.2] in paragraph 4.2.3 that *"[t]he agreement as interpreted by the plaintiff, entitles the plaintiff to recover from the defendant commissions paid in the circumstances described in the particulars of claim <u>without obliging the plaintiff to give the defendant credit for commissions earned</u>."* (emphasis added)

[24] There is indeed a clause in the agreement which is relied on in the particulars of claim and which allows the plaintiff to decline to take into account in the reconciliation on which its claim is based, commissions which would otherwise have been payable to the defendant. That is clause 9.3 which requires the defendant to forfeit commissions which would otherwise have been payable to

[7] *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E); *Wilson v SAR&H* 1981 (3) SA 1016 (C).

him in circumstances where the plaintiff terminates the agreement summarily on account of a material breach by the defendant.

[25] In my view the plea is also open to the interpretation that the impugned defences are directed at clause 9.3 and commissions excluded from the reconciliation in terms of that clause, rather than at repayments of advances on commission. On that interpretation, the impugned paragraphs are not excipiable on the grounds complained of by the plaintiff.

[26] The plaintiff conceded in its heads of argument that *"[t]he forfeiture of the right to earn further commission may be construed as a penalty"* but goes on to say, *"[h]owever, the obligation to repay commissions advanced and not earned can never be regarded as a penalty."* The difficulty for the plaintiff is that on the second interpretation of the ambiguous paragraphs of the plea, the impugned defences are directed at that very forfeiture and not at the obligation to repay commissions advanced but not due.

[27] I accordingly make the following order:

[27.1] The exception is dismissed with costs.

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AC DODSON AJ

COUNSEL FOR THE PLAINTIFF/EXCIPIENT:	ADV JF STEYN
INSTRUCTED BY:	GEIRINGS ATTORNEYS, 79 HAMLYN STREET, HIGHLANDS NORTH EXT, JOHANNESBURG
COUNSEL FOR THE RESPONDENT/DEFENDANT:	ADV A FRIEDMAN
INSTRUCTED BY:	BRIAN BLEAZARD ATTORNEYS, 5 ANNERLEY ROAD, PARKTOWN, JOHANNESBURG C/O BOTHA, KRUGER & DU PLESSIS, 4TH FLOOR, 84 MARKET STREET, JOHANNESBURG

HEARD: 24 OCTOBER 2012

JUDGMENT DELIVERED: 29 November 2012