REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:22431/2013

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE_____ _____
SIGNATURE

In the matter between:

BULA COMMUNICATION TECHNOLOGIES (PTY) LIMITED Plaintiff

and

DELL COMPUTER (PTY) LIMITED Defendant

JUDGMENT

MAYAT J

[1] The present hearing relates to eight interlinked grounds of exception raised by the defendant to the plaintiff's particulars of claim. The said exceptions are based on a notice in terms of rule 23(1) of the Uniform Rules of Court filed on behalf of the defendant on the 31st of July 2013. In terms of the said notice, the defendant afforded the plaintiff an opportunity to remove the cause of complaints, failing which the

defendant would take further steps to except to the plaintiff's particulars of claim on the basis of the notice filed.

[2] Prior to the hearing of this matter, the plaintiff's counsel conceded one of the grounds of exception in her heads of argument. Thus, it was indicated that the plaintiff's particulars of claim would be amended in due course to remove the cause of complaint on the basis of the said ground of exception only. The defendant, as excipient, now seeks an order on the basis of the remaining grounds of exception. Moreover, notwithstanding the concession by the plaintiff's counsel in relation to one ground of exception, it appears that the ambit of the ground of exception, which has been conceded by the defendant, has been widened on the basis of further submissions by the defendant's counsel.

RELEVANT BACKGROUND

[3] The plaintiff claims damages against the defendant primarily as a result of the defendant's averred repudiation of a business relationship agreement, concluded between the parties on the 12th of May 2005. The said agreement, which is annexed to the particulars of claim, marked "A", is referred to in the particulars of claim and this judgment as "the BRA".

[4] It appears from the copy of the BRA, annexed to the plaintiff's particulars of claim, that the plaintiff had appointed the defendant as the plaintiff's authorized supplier for Dell products within the Republic of South Africa. Thus, it is averred in the particulars of claim that the defendant granted the plaintiff the right to supply such products, (hereinafter referred to as "the products"), inter alia to public bodies, the financial sector, small to medium companies and customers as agreed from time to time.

[5] It also appears from the copy of the BRA annexed to the particulars of claim that clause 3.1 provided that the term of the BRA was 12 months

from the date thereof, renewable automatically, until both parties agreed to terminate the said agreement, as provided in clause 3.2. It was also specifically provided in clause 3.2 that the BRA could be terminated by either party upon three months written notice to the other party.

[6] It is stipulated in the particulars of claim that clause 14 of the BRA envisaged that the products could be sold by the plaintiff to its customers in two ways: firstly, on the basis of sales invoiced by the plaintiff to its customers and secondly, on the basis of sales invoiced by the defendant to customers of the plaintiff. In relation to the former category of sales, it is stated in clause 7.5 of the particulars of claim that clause 14 of the BRA provided that the plaintiff would be entitled to a commission, referred to in practice as a "rebate". In relation to the latter category of sales, it is stated in clause 7.6 of the particulars of claim that clause 14 of the BRA read with schedule 1 of clause 4 provided that the plaintiff would be entitled to a commission from the defendant.

[7] It is also asserted in the particulars of claim that pursuant to the conclusion of the BRA, the parties duly represented, concluded a written rebate agreement on the 21st of June 2007. The said agreement, which is annexed to the particulars of claim marked "B", is referred to in the particulars of claim and this judgment as "the Rebate Agreement". The Rebate Agreement provided for the agreed rebate percentage payable by the defendant to the plaintiff.

[8] It is further indicated in the particulars of claim and the annexures thereto that during the course of their dealings with each other within the framework of the BRA, the parties concluded a further agreement styled a deed of determination on the 2nd of December 2009. The said agreement, which is annexed to the particulars of claim marked "C", is referred to in the particulars of claim and this judgment as "the Deed of Determination." It appears that the said agreement is premised upon a

dispute between the parties relating to the formulation of the amounts payable by the defendant to the plaintiff in respect of the sale of the products for the period 1 March 2006 to 31 October 2009. Thus, the Deed of Determination sets out a formula and percentages for the calculation of the amounts payable by the defendant to the plaintiff for sale of the products in the stated period.

[9] In these circumstances, the plaintiff avers that in July 2009, the defendant repudiated the BRA by informing the plaintiff that it would no longer supply products as required in terms of the BRA. It is also stated in the particulars of claim in this regard that the said repudiation of the BRA was not accepted by the plaintiff. It is further averred in paragraph 13 of the particulars of claim that:

> "13 As a result of the repudiation the plaintiff has suffered the following damages:
>
> 13.1 loss of rebates in respect of sales invoiced by the plaintiff to its customers; and
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> 13.2 loss of commission in respect of sales that the defendant would make directly to the plaintiff's customers."

[10] Against the general averments set out above, it is specifically averred in relation to claim A for loss of rebates in the particulars of claim that by applying the formula and percentages referred to in the Deed of Determination, the plaintiff's damages were computed to be the sum of R61 510 425-76, calculated on the basis set out in annexure "D" to the plaintiff's particulars of claim. The said annexure "D" incorporated "forecasted calculations" on the basis of a 15% increase as well as estimated sales and rebates for the periods July 2009 to June 2010, July 2010 to June 2011, July 2011 to June 2012 and July 2012 to June 2013.

[11] It is further stated in paragraph 15 of the particulars of claim that the said claim in the sum of R61 510 425-76 constitutes the plaintiff's loss of rebates for the period December 2009 to May 2013, based inter alia

on the plaintiff's "historical trading figures and a projected estimated growth of 15%".

[12] It is further averred in paragraph 17 of the particulars of claim that the aforesaid damages in the sum of R61 510 425-76 flow directly from the defendant's repudiation of the BRA, alternatively were in the contemplation of the plaintiff and the defendant at the time of the conclusion of the BRA.

[13] As regards claim B, it is specifically averred in the particulars of claim that if the defendant took orders directly from the plaintiff's customers, the defendant was obliged to pay the plaintiff a commission equal to a percentage fee in force at the time of the order. It is accordingly averred in this context that it was an implied term of the BRA that the defendant would account to the plaintiff on demand, in respect of all orders taken directly by the defendant from the plaintiff's customers, listed in annexure 1 of the Deed of Determination.

[14] As with claim A, it is also averred specifically in relation to claim B for loss of commission in the particulars of claim, that the agreed fee in force at the time of the repudiation was determined by the formula and percentages applied in the Deed of Determination. It is further averred in the plaintiff's particulars of claim in relation to claim B that after the repudiation of the BRA by the defendant in July 2009, the defendant took orders and supplied products directly to the plaintiff's customers.

[15] It is finally averred in the context of claim B, that in order to ascertain the quantum of the commission, payable to the plaintiff, the defendant is obliged to account to the plaintiff in respect of orders taken by the defendant from the plaintiff's customers; the price and invoice of the value of such orders; and the commission due to the plaintiff in respect of such orders. Thus, the plaintiff seeks a debatement of account from the defendant, as well as an order that the plaintiff is paid whatever appears to be due to the plaintiff upon such debatement of account.

GENERAL LEGAL FRAMEWORK

[16] In terms of rule 18(4) of the Uniform Rules of Court, every pleading must set out material facts upon which it relies for its claim, with sufficient particularity to enable the opposite party to reply thereto. On the basis of this rule, it is well established that the plaintiff's particulars of claim must incorporate sufficient particularity to enable the defendant to plead thereto. [1] The absence of sufficient particularity may render the pleading in question either vague or vague and embarrassing in the sense that the excipient is prejudiced.

[17] It is also well established in our law, that in order to sustain any specific cause of action, the plaintiff's particulars of claim must set out every fact, which is necessary to prove such cause of action. However, it is not necessary for the plaintiff to set out in its particulars of claim every piece of evidence, which is necessary to prove every fact.[2] Thus, it was stated in the case of *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 903A-B:

> "A distinction must be drawn between the *facta probanda,* or primary factual allegations which every plaintiff must make, and the *facta probantia,* which are secondary allegations upon which the plaintiff will rely in support of his primary factual allegations."

[18] It is also a basic principle in relation to the wording of the plaintiff's particulars of claim that such particulars must be lucid and logical in the sense that the plaintiff's cause of action must appear clearly therefrom. As such, the defendant should be able fairly and reasonably to respond thereto. [3]

[19] As regards a claim for damages, in the case of *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd* 1977 (3) SA 670 (A) at 687,

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[1] *Nell and Others v McArthur and Others* 2003(4) SA 142 at 145E-147B
[2] *Mckenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD at 23
[3] See for example, the *dicta* of McCreath J in the case of *Trope v South African Reserve Bank and Another* 1992(3) SA 208 TPD at 210G-I

Corbett JA made reference to the well-known rules in the English case of *Hadley v Baxendale* (1854) 150 ER 145, which reads as follows (at p 151) :

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

[20] After the learned Judge further pointed out that our law and the laws of England are in substantial agreement on this point, he stated that the first rule in the *Hadley* case, are often labelled "general" or "intrinsic" damages, whilst, the second rule are called "special" or "extrinsic damages.

EXCEPTIONS

[21] As already indicated the defendant relies upon eight interlinked grounds of exception.

The First Ground of Exception

[22] The first cause of complaint by the defendant is that whilst claim A for damages is premised upon the repudiation of a contract concluded in 2005, the formulation of the said damages is premised upon the Deed of Determination concluded between the parties on the 2nd of December 2009 in relation to a dispute for a specific period. This is exacerbated by the fact that whilst this claim for rebates is premised upon sales "invoiced" by the plaintiff, the amount of the damages claimed is quantified on the basis of projected sales for a period of three years from December 2009 to May 2013. This is so despite the fact the BRA could be terminated upon three months notice.

[23] I agree that to the extent that paragraph 13.1 of the particulars of claim relates to sales "invoiced" by the plaintiff, the averments in Annexure

"D" do not substantiate the facts set out in paragraph 13.1 of the particulars of claim and evidence in relation to Annexure "D" cannot prove the facts alleged in paragraph 13.1 at the trial. Thus, to the extent that paragraph 13.1 of the particulars of claim relating to damages in the form of loss of rebates is premised, in plain English, upon actual sales, it is incongruous for the plaintiff to calculate such loss in paragraph 15 of the particulars of claim inter alia on the basis of historical trading figures and projected income for the period December 2009 to May 2013. Stated in another way, even if the allegations in Annexure "D" are proven at the trial, the alleged loss of rebates based upon sales actually invoiced will not be proved.

[24] In my view, it does not avail the defendant to rely on the totality of the plaintiff's particulars of claim premised upon the notional possibility in terms of the BRA indicating that the plaintiff had two streams of income from the defendant. The fact is that the defendant is called upon to respond to an averment in plain English that the plaintiff suffered loss of rebates in respect of sales actually invoiced by the plaintiff to its customers. The plain grammatical construction of paragraph 13.1 of the particulars of claim (unlike paragraph 13.2 relating to claim B) does not connote that claim A relates to losses for sales, which the plaintiff *would* or *should* have invoiced, but for the defendant's averred repudiation.

[25] It is also my view that the suggestion by the defendant's counsel to the effect that the wording of paragraph 13.1 of the particulars of claim ought to be construed in the totality of the particulars of claim, effectively demonstrates that the particulars of claim are contradictory and/or vague and embarrassing in the sense that paragraph 3.1 has at least two meanings. Thus, as McCreath J stated in the case of *Trope,* the defendant is left guessing as to the actual meaning conveyed in the pleading.[4] This is particularly so as paragraph 13.2 of the particulars of

[4] at 211D-F

claim (relating to claim B) clearly states that the plaintiff suffered damages as a result of sales the defendant "would" make directly to the plaintiff's customers.

[26] For the reasons given above as well the further findings in relation to the remaining grounds of exception, it is my view that the exception to the particulars of claim relating to the averments pertaining to claim A as a whole, must accordingly be upheld.

The Second Ground of Exception

[27] The second cause of complaint by the defendant is that whilst claim B for damages is premised upon the repudiation of a contract concluded in 2005, the computation of the said damages is premised upon the Deed of Determination concluded between the parties on the 2nd of December 2009.

[28] In my view, the primary factual allegations, which the plaintiff must make in relation to claim B, are incorporated in the particulars of claim. The secondary allegations relating to the computation of the damages premised inter alia upon a proper debatement of account by the defendant do not have to be set out in the particulars of claim. Counsel for the plaintiff conceded as much by contending that if the cause of complaints relating to claim A is removed, the particulars do disclose a cause of action in relation to claim B, autonomously of claim A.

[29] This ground of exception must accordingly be dismissed, given my findings relating to claim A.

The Third Ground of Exception

[30] The third cause of complaint in relation to claim A is that whilst the plaintiff avers that it suffered loss of rebates in respect of sales invoiced by the plaintiff to the plaintiff's customers, the plaintiff fails to particularize sales actually invoiced to the plaintiff's customers. Thus, as already stated in the context of the first ground of exception, it is

contended that instead of providing particularity with respect to sales "invoiced" by the plaintiff, the plaintiff quantifies its alleged loss in this respect on the basis of an estimate incorporated in Annexure "D". The said estimate in Annexure "D" is based upon historical trading figures for a specific period and a projected estimated growth of 15%.

[31] For the reasons already given in relation to the first ground of exception, it is my view that as a result of the above inconsistency, the particulars of claim lack averments necessary to sustain the plaintiff's cause of action in relation to claim A. Furthermore, the particulars of claim in this respect only in relation to claim A (and not claim B) are also rendered vague and embarrassing on this basis.

The Fourth Ground of Exception

[32] The fourth cause of complaint, which counsel for the plaintiff characterized as the main exception, relates to the averment in the particulars of claim that the plaintiff's claim for damages flow directly from the defendant's repudiation of the BRA, alternatively were in the contemplation of the plaintiff and the defendant at the time the BRA was concluded on the 12th of May 2005. This is so despite the fact that the alleged damages are computed on the basis of the Rebate Agreement concluded on the 21st of June 2007, and the Deed of Determination on the 2nd of December 2009.

[33] For the reasons already given, the claim for damages arising from sales invoiced by the plaintiff in relation to claim A is not sustained by the quantification of such averred damages on the basis of historical sales for a different period and projected estimates. Moreover, to the extent that it is suggested that the damages in this respect arise from sales, which the plaintiff would have invoiced, the particulars of claim are vague and embarrassing in that at least two possible meanings can be attributed to the wording in the particulars of claim.

[34] This ground of exception is accordingly also upheld in relation to claim A.

The Fifth Ground of Exception

[35] This ground of exception, premised upon the averment that the plaintiff's claim constitutes substitutionary damages, was not pursued at the hearing of this matter.

The Sixth Ground of Exception

[36] The defendant complains that paragraph 13.2 of the plaintiff's particulars of claim is vague and embarrassing. As already indicated, notwithstanding the problematic aspects relating to claim A, referred to the above, it is my view that the primary factual allegations, which the plaintiff makes in the particulars of claim in relation to claim B, autonomously of claim A, properly disclose a cause of action for damages. Thus, if these factual allegations are proved at trial, autonomously of claim A, the plaintiff will have a cause of action in relation to claim B.

[37] In these circumstances, this ground of exception cannot be upheld.

The Seventh Ground of Exception

[38] The seventh cause of complaint is that to the extent that the plaintiff claims special damages in relation to claim A, the plaintiff's particulars of claim lacks averments necessary to sustain this claim for special damages.

[39] The plaintiff's counsel concedes this complaint and indicates in her heads of argument that the plaintiff's particulars of claim will be amended to remove this cause of complaint. It may also be mentioned in this respect that the plaintiff's counsel indicated at the hearing of this matter that she had advised the defendant that the amendment of the particulars of claim should only be effected after this court had adjudicated upon all the exceptions raised by the defendant.

[40] Notwithstanding the concession by the plaintiff's counsel in this respect, the defendant's counsel emphasized that to the extent that the plaintiff's claim incorporates a claim for both general and special damages over a period of some three years, it is significant that clause 3.2 of the BRA provides that the BRA may be terminated at any time upon three months written notice to the other party.[5] Thus, the defendant's counsel contended that the claim for damages over a period of three years could not have been in the contemplation of the plaintiff and the defendant at the time of the conclusion of the BRA, nor do such damages flow directly from the defendant's repudiation of the BRA.[6]

[41] The plaintiff's counsel indicated in this context that in terms of clause 3.1 of the BRA, the agreement between the parties was automatically renewable after an initial period of 12 months, on an indefinite basis, until the BRA was terminated as provided in clause 3.2. As such, it was suggested that the parties legitimately contemplated the renewal of the BRA on an indefinite basis.

[42] For the reasons already given above, I am of the view that the averments in the plaintiff's particulars of claim relating to claim A as a whole are excipiable. Thus, to the extent that I propose granting the plaintiff leave to amend its particulars of claim in relation to claim A as a whole, autonomously of the averments relating to claim B, the

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[5] The defendant's counsel made reference in this context to the case of *Telematrix (Pty) Ltd v Advertising Standards Authority of SA* 2006(1) SA 461 SCA at 464, para [3] where Harms JA held that exceptions should be treated sensibly in so far as they provide as a mechanism to weed out cases without legal merit. As such, the learned Judge held that an over-technical approach destroys their utility. Reference was also made to the case of *SA Enterprise Development Fund v ICC Africa Ltd* 2008(6) SA 468 WLD at 480G-I, where Van Oosten J held that it is appropriate and necessary in certain circumstances for the court to raise an exception *mero motu* to ensure that justice is done, particularly so, where a fundamental issue arises, which the parties have overlooked or failed to recognize.

[6] As stated by the Appellate Division in this respect in the case of *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976(2) SA 545 (A) the decisive time for ascertaining the parties' contemplation relating to any loss upon breach of a contract, is the time when the parties contracted and not when the contract is breached.

competing submission of counsel in this regard are effectively moot points.

[43] Whilst I cannot of course comment on the amended particulars of claim in the context of the present hearing, I take cognisance of the fact that the plaintiff specifically avers that the BRA was not terminated pursuant to the defendant's repudiation. Thus, it appears that to the extent that clause 3.1 suggested an agreement between the parties for an indefinite period (until terminated as envisaged in paragraph 3.2 of the BRA), the plaintiff's particulars of claim suggest that the BRA continued for more than three months after the defendant's averred repudiation. Be that as it may, as already indicated, as a result of my other findings in relation to the averments in support of claim A as a whole, it is not strictly necessary for me to express a view on the competing averments in relation to this ground of exception.

The Eighth Ground of Exception

[44] The eighth cause of complaint is that claim A of the particulars of claim is a duplication of claim B, as both claims are for the same cause of action, for the same period and arising from the same breach. Thus, it was suggested by the defendant's counsel in this respect, that paragraph 13.2 relating to damages arising from loss of commission, could theoretically include sales that were made by the defendant directly to the plaintiff's customers. Be that as it may, the defendant's counsel also correctly conceded that if the defendant's exceptions to claim A are upheld, then the particulars of claim relating to claim B (autonomously of claim A) would not be excipiable.

[45] It may be noted in this context that even though I have found that the averments relating to claim A of the plaintiff's particulars of claim are excipiable for the reasons given above, it appears not to be in dispute that the BRA envisaged two streams of income emanating from rebates and commission. It can merely be noted at this juncture in this context that the defendant can hypothetically be called upon to plead to

a claim for damages premised firstly upon loss of rebates, which the plaintiff *would* have earned, but for the defendant's averred repudiation of the BRA, as well as damages premised upon claim B. However, in the absence of amendments to the particulars of claim in the present form, the defendant is called upon to plead to a claim for rebates arising from sales *actually* invoiced by the plaintiff.

CONCLUSION

[46] Therefore, for the reasons given, the averments relating to claim A are excipiable, and I propose granting the plaintiff leave to amend its particulars of claim in this respect.

COSTS

[47] Even though all the grounds of exception have not been upheld, I consider the defendant to have been substantially successful, to the extent that the exceptions relating to claim A as a whole have been upheld. In these circumstances, I am of the view that it is just and equitable that the costs of the present hearing be borne by the plaintiff. In view of the amount of the plaintiff's claim, and the obvious importance of this matter to the parties, I am also of the view that the costs of two counsel are also warranted.

ORDER

[48] Based on the aforegoing, the following order is made:

i) The exceptions relating to claim A in the particulars of claim are upheld, and the averments in the plaintiff's particulars of claim in this respect are set aside.

ii) The plaintiff is granted leave to deliver amended particulars of claim within 20 court days from the date hereof.

iii) The plaintiff is directed to pay the defendant's costs, including costs occasioned by the utilization of two counsel.

DATED AT JOHANNESBURG THIS 14th DAY OF MARCH 2014

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MAYAT J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

Plaintiff's Counsel	:	P. Cirone
Plaintiff's Attorneys	:	Werksmans Attorneys
Excipent/Defendant's Counsel	:	D.M. Fine SC
		H.J. Smith
Excipient/Defendant's Attorneys	:	Cliffe Dekker Hofmeyr Inc
Date of Hearing	:	10th of March 2014
Date of Judgment	:	14th of March 2014