REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 40974/2018

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

28/06/19 ..... ML Twala .....

Date **ML TWALA**

In the matter between:

JAYED PRODUCTS AND SERVICES CC **PLAINTIFF**

AND

TARSUS DISTRIBUTION (PTY) LTD **DEFENDANT**

JUDGMENT

TWALA J

[1] Before this Court, is an application wherein the defendant raises an exception against the plaintiff's particulars of claim to the summons on the grounds that it is bad in law, lacks averments necessary to sustain a cause of action and/or that it is vague and embarrassing and/or fails to comply with Rule 18(6).

[2] The plaintiff instituted action against the defendant for payment of the sum of R750 617.27 based on an oral agreement which was entered into by the parties in October 2013 and the action is defended. The defendant filed a notice of exception and raised 8 causes of complaint and called upon the plaintiff remove same within 15 days. The plaintiff, instead of attending to the cause of complaint, filed an application for summary judgment which was strenuously resisted by the defendant. Despite that summary judgment was not granted, the plaintiff persisted in its particulars of claim to the summons and is opposing the exception on the basis that there is nothing amiss with its pleading.

[3] In order to put context to the material issues in this case, I consider it necessary to quote the relevant paragraphs of the particulars of claim:

"para 4

The plaintiff is the exclusive licence holder for the manufacturing and or supply of computer related goods in the Republic of South Africa

under the trademark known as 'Soviet' (hereinafter referred to as 'Soviet Goods').

Para 5

During October 2013 and at Johannesburg, the plaintiff duly represented by James Walter Binsbergen and the defendant, represented by Gary Austin Pickford entered into an oral royalty agreement ('agreement') which agreement had the following express, alternatively tacit, further alternatively implied terms:

5.1 the plaintiff would see to the manufacturing and or supply of the Soviet goods to the defendant;

5.2 the defendant would appoint a manufacturer to manufacture the Soviet goods, which manufacturer would be appointed by mutual agreement between the plaintiff and the defendant;

5.3 the defendant would place an order for Soviet goods at the manufacturer;

5.4 the manufacturer would then deliver the manufactured Soviet goods directly to the defendant;

5.5 the defendant would effect payment of the Soviet good directly to the manufacturer excluding royalties;

5.6 the defendant would then sell and or dispose of the Soviet goods to customers;

5.7 the defendant would on receipt of the Soviet goods from the manufacturer become liable for payment of royalties to the plaintiff, as calculated infra;

5.8 payment of the amount due for royalties to the plaintiff would be on the last day of every sales quarter, which sales quarters would run from;

5.8.1 the beginning of January to the end of March;

5.8.2 the beginning of April to the end of June;

5.8.3 the beginning of July to the end of September;

5.8.4 the beginning of October to the end of December.

5.9 At the end of the sales quarter, the defendant would furnish the plaintiff with a detailed statement indicating the physical quantity of Soviet goods sold and or disposed of to its customers;

5.10 payment for royalties would be calculated on the physical quantity of units sold and or disposed of in every sales quarter.

5.11 the defendant would then furnish the plaintiff with a schedule indicating the physical number of Soviet goods sold and or disposed of to customers in the specific sales quarter.

5.12 the plaintiff would then invoice the defendant for payment of royalties calculated as follows:

5.12.1 10% on the manufacturing costs plus 10% compounded, based on the physical units sold and or disposed of by the defendant to customers.

Para 6

In the aforesaid, the plaintiff and the defendant, by mutual agreement, appointed Port Manufactures for the manufacturing and or supply of the Soviet goods to the defendant.

Para 7

The plaintiff complied with the terms of the agreement.

Para 8

At the end of the December 2015 sales quarter the plaintiff requested the schedule of physical quantity of goods sold and or disposed by the defendant to customers from the defendant.

Para 9

The defendant breached the agreement in that it failed to furnish the plaintiff with the necessary schedule as required in terms of the agreement.

Para 10

During the relevant sales quarter, and as is common cause between the plaintiff and the defendant, the defendant sold and or disposed of Soviet goods to customers to the manufacturing value of R3 200 000.

Para 11

Based on the calculation herein supra, the defendant is liable for payment of royalties to the plaintiff in the amount of R750 617.27.

Para 12

Despite demand the defendant refuses and or neglects to effect payment in as aforesaid.

Para 13

The defendant breached the said agreement by failing and or refusing to pay to the plaintiff the royalties due and payable in terms of the agreement.

Para 14

On 26 September 2018 the plaintiff and the defendant agreed that prescription of the matter be stayed until 7 November 2018. I annex hereto the said agreement as annexure 'poc1'.

[4] It is trite that an exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. It is not directed at a particular paragraph within the cause of action but at the cause

of action as a whole, which must be demonstrated to be vague and embarrassing.

[5] In *M Ramanna and Associates cc v The Ekurhuleni Development Company (Pty) Ltd, case No: 25832/2013 (4 April 2014) ZAGPJHC* this Court stated the following:

"it is 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 abolition of the requests for further particulars of pleading and 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; and the cause of action or defence must appear clearly from the factual allegations made.

The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed and this fundamental principle can only be achieved when each party states his case with precision".

[6] In *Khan v Stuart 1942 CPD 386 at 392* a decision which was quoted with approval in the Ramanna case supra, the Court stated the following:

"it is the duty of the court, when an exception is taken to a pleading, first to ascertain if there is a point of law to be decided which will dispose of the case in whole or in part. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed".

[7] At the outset, I do not consider it necessary to deal with each and every paragraph of the plaintiff's particulars of claim to the summons against which a complaint has been raised as it is trite that the duty of the Court is to consider the plaintiff's particulars of claim as a whole. I will however endeavour to identify those that I consider material in this case.

[8] There is a plethora of authority that where a pleading lacks averments necessary to sustain a cause of action, it is either meaningless or ambiguous and capable of more than one meaning or can be read in any one of a number of ways. Where a Court upholds an exception which alleges that a pleading is vague and embarrassing, leave to amend is generally granted to the party which produced the excipiable pleading. However, where an exception to a pleading is brought on the ground that it is vague and embarrassing, it involves a two-fold enquiry, the first being whether the pleading lacks particularity to the extent that it is vague and secondly whether the vagueness causes embarrassment of such a nature that one is prejudiced to the extent that it is unable to properly prepare to meet the case of its opponent.

[9] I am unable to disagree with counsel for the excipient that the plaintiff's particulars of claim are reliant on an exclusive license holder agreement which has not been annexed to the summons as required by rule 18(4) of the Rules of Court. The plaintiff finds its locu standi in this agreement and therefore, the contractual relationship between the plaintiff and the licence holder is material. I am of the view therefore that without establishing its locu standi, the plaintiff's case may be dismissed. Therefore, it is my considered view that the exception must succeed on this point.

[10] Counsel for the excipient contended that the method of calculating the amount to be paid for the royalties is difficult to comprehend. The 10% on the manufacturing costs plus 10% compounded is incomprehensible as there is no basis on how it is compounded. It is contended further that it is not clear when did the amount claimed become due and payable as the particulars of claim do not establish if and when an invoice was rendered. It is not sufficient to say that, so it is argued, the plaintiff has complied with the terms of the agreement for the exact date of rendering the invoice is a factor to be considered for issues of prescription.

[11] I am unable to disagree with counsel for the excipient. Prescription is a factor in cases of this nature. Prescription starts running on a particular date and when certain things have taken place. It is impossible to determine in this case if an invoice was tendered and when was it tendered to make the debt due and payable.

[12] I disagree with counsel for the plaintiff that the excipient could have pleaded a bare denial and requested further particulars for the purposes of trial in terms of the rules. It is undesirable for a party to plead in such a manner that the other is not in a position to know what case he is to meet. Moreover, the plaintiff's particulars of claim should be clear in such a way that the defendant, if it really knows what the case of the plaintiff is, has an option to tender payment if necessary rather than to incur costs until trial stage. Further, the method of calculating the amount due is flawed to the extent that no Court would give a judgment on the amount claimed.

[13] I hold the view therefore, that the plaintiff's particulars of claim to the summons are vague and embarrassing to the extent that the excipient is

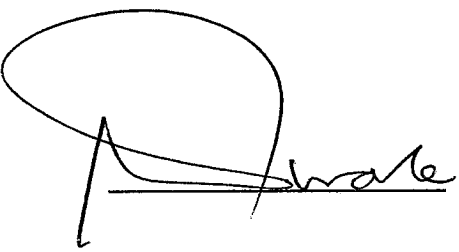
prejudiced thereby. It is my respectful view therefore that the excipient must succeed with its exception.

[14] In the circumstances, I make the following order:

I. The excipient's exception is upheld and the plaintiff's particulars of claim are struck-out;

II. The plaintiff is granted leave to substitute and or amend such struck out particulars of claim within 20 days of the date of this order;

III. The plaintiff is to pay the excipient's costs of the exception.



TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: **10th June 2019**

Date of Judgment: **28th June 2019**

For the Plaintiff: **Adv. GW Amm**

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For the Respondent: **Adv. T J Jooste**

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