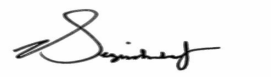
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 5754/2020

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

DATE: 16/8/21



In the matter between: -

COETZER, AUGUSTE LOUISE Excipient / Plaintiff

and

PEOPLE PERFECT (PTY) LTD
t/a SIGNIUM AFRICA Respondent / Defendant

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 16 August 2021.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] This is the determination of an exception taken by the plaintiff to the defendant's plea.

[2] The plaintiff's action arises from the alleged repudiation of a varied shareholders' and employment agreement concluded between the plaintiff and the defendant. The plaintiff avers that she did not accept the repudiation, and is entitled to claim damages on the basis that the relationship between her and the defendant had broken down irretrievably.

[3] The exception consists of three grounds, all of which go to the alleged failure by the defendant to make averments necessary to disclose a defence against the plaintiff's claim. All three exceptions each have an alternative contention that the plea is vague and embarrassing to the extent that the plaintiff is prejudiced thereby.

[4] The three grounds of exception are as follows: -

[a] The first ground relates to sub-paragraph 42.5 of the plea where it is alleged that the defendant failed to plead a material term in order to disclose a defence, alternatively its pleading is vague and embarrassing in that the plaintiff cannot determine whether the alleged material term related to the termination of the employment agreement or not;

[b] The second ground relates to sub-paragraph 25.5 of the plea in that

the plaintiff alleges that the defendant failed to advance how and on what basis the employment agreement (annexure "ALC6") was amended, substituted or otherwise varied in the light of the shareholders' agreement;

[c] The third ground relates to sub-paragraph 42.7 of the plea where it is alleged that the defendant failed to plead on what basis the plaintiff's position as a director was terminated by the latest on 31 October 2019 and/or on what basis the plaintiff was not entitled to continue to be a director of the defendant after 31 October 2019.

[5] The defendant questions the exception on the following basis: -

[a] Is the plea excipiable on every reasonable interpretation?

[b] In particular, is the plea vague?

[c] If so, is it so vague, that the plaintiff cannot meaningfully replicate to the plea or prepare for trial?

[d] The plaintiff's interpretation of the plea is unreasonable.

[e] On a reasonable interpretation of the plea it is not excipiable because it comprehensively and clearly sets out facts necessary to disclose a defence.

[6] The plaintiff seeks an order striking out the relevant paragraphs in the plea and an order for costs. Conversely, the defendant asks for a dismissal of the exception with costs.

THE PARTICULARS OF CLAIM

[7] The defendant carries on business as an executive search recruitment company and other related human resources services.

[8] The plaintiff is a former shareholder, director and employee of the defendant.

[9] On 23 June 2009 the plaintiff and the defendant concluded a written shareholders' agreement. The relevant material express terms of the shareholders' agreement for purposes of the exception, included the following: -

> *"17.10.1 All shareholders shall retire from the service of the Company, if employed in their capacities as an (sic) employees of the company on the last day of the financial year of the company* ***in which they reach the age of 70*** *(SEVENTY)* ***unless otherwise agreed*** *in which event they shall also cease to be a director of the Company with effect from that date ('termination date'). (emphasis added)*

[10] On 18 November 2009 the defendant employed the plaintiff as its senior partner and director by way of a written letter of employment, the relevant material express terms for purposes of the exception whereof were as follows: -

> ***Termination of services***
>
> *A minimum of 1 calendar month and maximum of 3 calendar months notice period, depending on your workload, will apply unless otherwise negotiated and agreed in writing should you or the Company decide to terminate this agreement."*

> "***Retirement***
>
> *Your employment will* ***automatically terminate when you reach 66 years of age****, unless otherwise agreed to* ***in writing****.* (emphasis added)

[11] In 2019 when the plaintiff had reached the age of 71, she avers that at a strategy meeting it was agreed by acquiescence that the period of her employment would be extended to age 75 "*thereby effectively varying, alternatively waiving the provisions set out in annexures "ALC1" to* ***ALC6"*** *pertaining to her age of retirement*"[1] ("*the variation"*).

[12] The plaintiff avers that pursuant to the variation she continued working in with the full consent of the defendant, which acted thereon by *inter alia* acknowledging and recognising her billings, by paying her commissions, by paying her director's remuneration and by employing the provisions of the Basic Conditions of Employment Act in its relationship with her.

[13] On 13 September 2019 at a special board meeting the plaintiff asserts that the remaining four shareholders of the defendant informed her that they were of the view that she was to be offered a retirement immediately.

[14] On 15 October 2019 the chairman addressed a letter to the plaintiff incorporating a written letter of resignation for her to sign. The letter further informed the plaintiff that a further meeting of shareholders would take place on 31 October 2019 when consideration would be given to a resolution to remove the plaintiff as a director of the defendant. On 31

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[1] Particulars of Claim: para 17

October 2019 the plaintiff was removed as a director by a show of hands.

[15] The plaintiff alleges that the defendant's decision to remove her as a director and to impose a retirement upon her as a senior partner of the defendant amounted to an unfair dismissal as understood under the provisions of the Labour Relations Act, 66 of 1995.

THE PLEA

[16] To the allegation of an unfair dismissal, the defendant pleads that it was a material express term of the shareholders' agreement that a shareholder employed by the defendant would retire on the last day of the financial year of the defendant in which such shareholder reaches the age of 70. The plaintiff was born on 25 January 1948 and the last day of the financial year in which the plaintiff reached the age of 70 was 31 May 2018. The plaintiff was therefore obliged to retire and cease to be a director of the defendant on 31 May 2018.[2]

[17] Then the plaintiff pleads at paragraph 42.5 as follows: -

> *"Alternatively or in any event, it was a material term of the plaintiff's employment agreement attached to the particulars of claim as "ALC6", alternatively to the extent that employment agreement at "ALC6" had automatically terminated in the year the plaintiff turned 66 the tacit employment agreement that endured after such termination on the same terms and conditions as "ALC6", that the defendant would be entitled to terminate the employment of the plaintiff on a minimum of 1 and a maximum of 3 calendar months'*

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[2] Plea, paragraphs 42.1 to 42.4.

notice in writing, depending on the plaintiff's workload;"

[18] The defendant pleads in paragraph 42.7 of the plea that the plaintiff's workload at the time did not require written notice of more than one month and that: -

> *"On 30 September 2019, the defendant duly gave the plaintiff one month's notice in writing of the termination of her employment on 31 October 2019."*

[19] The defendant pleads that the plaintiff's employment as a senior partner and director of the defendant was accordingly duly and lawfully terminated by the latest on 31 October 2019 and/or the plaintiff was not entitled to continue to be an employee or a director of the defendant after 31 October 2019.[3]

[20] The defendant denies that the shareholders' agreement was varied, which is amplified by the averment that the shareholders' agreement contained a non-variation clause which provides that the terms of the agreement would only be substituted or varied, except by agreement in writing and that any relaxation, indulgence or delay by any of the parties in exercising or failing to exercise any right under the shareholders' agreement would not be construed as a waiver of that right, unless also reduced to writing. [4]

THE LAW ON EXCEPTIONS

[21] Although the principles applicable to exceptions are trite, a reminder will do

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[3] Plea: para 42.8, 42.8.1 to 42.8.
[4] Plea: para 42.5.1 and 42.5.2.

no harm.

[22] Where there is uncertainty in regard to the pleader's intention, the excipient cannot have the pleading declared bad in law without showing that on any construction of the pleading the claim is excipiable.[5]

[23] Ultimately an excipient has the duty to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed.[6]

[24] An exception that a pleading is vague and embarrassing ought not to be allowed, unless the excipient would be seriously prejudiced if the offending allegations were not expunged,[7] bearing in mind that a pleading will not cease to be prejudicial merely because it is possible to draft an unexcipiable response to it.[8]

[25] Prejudice to a litigant faced with an embarrassing pleading must ultimately lie in an inability properly to prepare to meet the opponent's case.[9]

[26] In Barclays National Bank Ltd v Thompson[10] the Appellate Division (as it then was) held that the function of a well-founded exception that a plea, or part thereof, does not disclose a defence to the plaintiff's cause of action is to dispose of the case in whole or in part. It is for this reason that exception

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5 Klerck N.O. v Van Zyl and Maritz N.O. and Related Cases 1989 (4) SA 263 (SE) at 288, citing Callender-Easby v Grahamstown Municipality 1981 (2) SA 810 (E) at 813; see also Herbstein & Van Winsen: The Civil Practice of the High Court of South Africa, 5th edition, vol 1, p 637.

6 Francis v Sharp 2004 (3) SA 230 (C) at 233; First National Bank of Southern Africa Ltd v Perry N.O. 2001 (3) SA 960 (SCA) at 965.

7 Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298A – B.

8 Trope v SA Reserve Bank and two other cases 1992 (3) SA 208 (T) at 211B – D.

9 Levitan v Newhaven Holiday Enterprises CC (*supra*) at 298.

10 1989 (1) SA 547 (A).

cannot be taken to part of a plea unless it is self-contained, amounts to a separate defence and can therefore be struck out without affecting the remainder of the plea.[11]

[27] The appeal court explained the main purpose of an exception as follows: -

> *"In respect of a declaration that does not disclose a cause of action the aim with an exception is to avoid the leading of unnecessary evidence at trial."*[12]

[28] An exception to a plea should not be allowed unless, if upheld, it would obviate the leading of unnecessary evidence.[13] This principles was confirmed in McKelvey v Cowan N.O.[14]: -

> *"It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action."*

[29] To this must be added the consideration that the validity of an agreement and the question whether a purported contract may be void for vagueness do not readily fall to be decided by way of an exception.[15]

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11 Salzmann v Holmes 1914 AD 152 at 156; Barrett v Rewi Bulawayo Development Syndicate Ltd 1922 AD 457 at 459.
12 Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) at 706.
13 Welgemoed en Andere v Sauer 1974 (4) SA 1 (A).
14 1980 (4) SA 525 (Z) at 526.
15 Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A); Burroughs Machines Ltd v Chenill Corporation of SA (Pty) Ltd 1964 (1) SA 669 (W); Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 (1) SA 508 (A).

AN ANALYSIS OF THE GROUNDS OF EXCEPTION

First ground

[30] Firstly, the plaintiff avers that the phrase *"alternatively or in any event…"* is confusing as the import of the phrase can be interpreted as an alternative to paragraphs 42.1 to 42.4 of the plea or as a reference to what precedes paragraph 42.5, i.e. a reliance on paragraph 42.1 to 42.4 (inclusive) and an elaboration on one of the terms of the shareholders' agreement.

[31] Secondly, plaintiff takes issue with the allegation contained in paragraph 42.5 of the plea that the material term relied on by the defendant is not pleaded and leaves the plaintiff guessing as to whether the term related to the termination of the employment agreement at age 66 or on a minimum of one and a maximum of three calendar months' notice.

[32] Thirdly, the plaintiff states that it does not appear from the allegation contained in paragraph 42.5 of the plea whether the defendant contends that the employment agreement actually came to an end when the plaintiff turned 66. If it did not, there would be no need even on the defendant's version, for a tacit employment agreement. If it did, the tacit employment agreement that endured thereafter, does not provide for the defendant to terminate the employment of the plaintiff on a minimum of one and a maximum of three calendar months' notice.

[33] Fourthly, the plaintiff alleges that the defendant failed to comply with the provisions of rule 18(6) of the Uniform Rules of Court in that it, as far as the tacit employment agreement is concerned, failed to plead whether the

defendant relies upon a written or oral agreement, when, where and by whom it was concluded, and if the contract was written, a true copy is to be annexed.

Deliberation- first ground

[34] It cannot be disputed by either party that the retirement age reflected in the shareholders' agreement differs from the age of retirement reflected in the employment agreement. The shareholders' agreement provides for a retirement age of 70, whereas the employment agreement indicates 66 years as the retirement age.

[35] The plaintiff avers at paragraph 18 of her particulars of claim that she was 71 in 2019. It is therefore safe to assume that the plaintiff had by that time passed the retirement ages agreed to in both the shareholders' and employment agreement. Yet, the plaintiff relies on a variation of both the shareholders' and employment agreement.

[36] This is the case that the defendant is called upon to meet.

[37] Paragraph 42.1 to 42.3 refers to the shareholders' agreement and paragraphs 42.2 and 42.3 proceed to calculate the date of retirement in accordance with the provisions of the shareholders' agreement. Paragraph 42.4 announces the result of the calculation with the word *"Therefore"* whereafter the defendant pleads that the plaintiff was obliged to retire and cease to be a director on 31 May 2018. This averment must be read in

conjunction with the defendant's denial of any variation.[16]

[38] Sub-paragraph 42.5 on the other hand, specifically refers to the employment agreement. Annexure ALC6 as already indicated expressly provided for a termination of the agreement other than an automatic termination premised on the agreed retirement age. This is in my view on a plain reading of the plea, clearly the material term relied on by the defendant.

[39] I therefore find that the use of the phrase "*alternatively or in any event*" does not render paragraph 42.5 vague and embarrassing.

[40] It is worthy to emphasise that paragraph 17 of the particulars of claim speaks of a variation or waiver of the provisions of **both "ALC1" and "ALC6"** "***pertaining to her age of retirement***" (emphasis added). This averment in my view, presupposes that both of the agreements were extant and capable of variation and that only the provisions pertaining to the age of retirement were varied, thereby leaving the balance of the terms contained in both agreements, unaffected.

[41] When reading paragraph 42.5 of the plea against the backdrop of the averments contained in paragraphs 16 to 18 of the plaintiff's particulars of claim, it becomes clear why the defendant pleads that *"to the extent"* that the employment agreement had automatically terminated at age 66, a tacit employment agreement would endure after such termination on the same terms, one of the terms being that the defendant would be entitled to

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16 Plea: para 24

terminate her employment on a minimum of one and a maximum of three calendar months' notice.

[42] Accordingly, the plaintiff would either retire and cease to be a director in terms of the shareholders' agreement at age 70, or her employment would be terminated on a minimum of one and a maximum of three calendar months' notice.

[43] Accordingly, I find no merit in this part of the plaintiff's objection either.

[44] Inasmuch as the plaintiff complains that the tacit agreement does not contain a term entitling the defendant to terminate the employment of the plaintiff on a minimum of one and a maximum of three calendar months' notice in writing, this simply cannot be as paragraph 42.5 of the plea expressly refers firstly, to the fact that the tacit employment agreement endured on the same terms and conditions as "ALC6" and secondly, as already indicated, "ALC6" does indeed contain such a termination clause.

[45] The defendant expressly states that it is a tacit agreement which is concluded on the same terms as "ALC6".

[46] A discussion of the legal principles regarding tacit terms is to be found in the judgment of Nienaber JA in Wilkins NO v Voges .[17] These principles have since been applied by the Supreme Court of Appeal, *inter alia*, in Botha v Coopers & Lybrand [18] and in Consol Ltd t/a Consol Glass v Twee Jonge

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17 1994 (3) SA 130 (A) at 136H-137D
18 2002 (5) SA 347 (SCA) paras 22-25

Gezellen (Pty) Ltd and another.[19] As stated in these cases, a tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. It therefore follows that by its very nature it is not reduced to writing.

[47] Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would *necessarily* have agreed upon such a term if it had been suggested to them at the time.[20]

[48] The conclusion is plain. The terms of the tacit agreement must be tested by way of evidence at trial. The failure to plead the terms of the tacit agreement (if I accept that this is indeed the case) does not render the plea excipiable as the plaintiff would have the opportunity to test the version of the defendant on trial. Moreover, nothing precludes the plaintiff from requesting further particulars for trial on this aspect.

[49] Accordingly, I find that the plaintiff's objection based on defendant's alleged non-compliance with rule 18(6) has no merit either.

Second ground

[50] The crux of the plaintiff's objection is that the defendant relies on the non-variation clauses in the shareholders' agreement to refute the allegation that it was varied, yet it does not explain why the alleged tacit employment agreement was not excluded by the express provisions relied

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19 [2004] 1 All SA 1 (SCA) paras 50-52

20 See *Consol Ltd t/a Consol Glass* supra para 50.

upon by the defendant in the shareholders' agreement including the variation thereof, which could only allegedly take place in writing.

[51] In addition, the plaintiff complains that the defendant does not explain how the tacit employment agreement could have been concluded between the parties in light of its clear contradiction of the retirement age of 70 expressly provided for within the ambit of the shareholders' agreement.

Deliberation – second ground

[52] It is common cause that the parties concluded a separate shareholders' agreement and a separate employment agreement. It is also common cause that these agreements provided for different retirement ages. On the plaintiff's own version therefore there was a conflict between the two agreements at the outset.

[53] The employment agreement has no non-variation clause but the retirement age clause is self-contained in that it requires a variation to be reduced to writing. However, it must be borne in mind, that the plaintiff herself relies on an oral variation of the employment agreement if regard is had to paragraphs 16 to 18 of her particulars of claim.

[54] I therefore do not find any merit in this ground.

Third ground

[55] The plaintiff complains that on the defendant's version, having given the plaintiff one month's notice in writing of the termination of her employment

on 31 October 2019, the defendant has failed to plead on what basis the plaintiff's position as director of the defendant was terminated on 31 October 2019.

Deliberation – third ground

[56] The employment contract provides that the defendant would be entitled to terminate the employment of the plaintiff on a minimum of one and a maximum of three calendar months' notice in writing.

[57] Notice was given to the plaintiff on the 30 September 2019 of the termination of her employment on 31 October 2019.

[58] Once the plaintiff exercised its election to terminate the plaintiff's employment on one month's notice, the plaintiff was no longer a director and senior partner. This is stated at paragraph 42.8.1 of the plea.

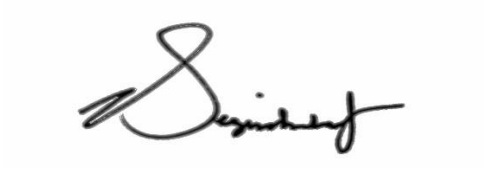
[59] Inasmuch as paragraph 42.8.2 of the plea avers that the plaintiff was not entitled to continue to be an employee or a director, the fact that the defendant does not explain why the plaintiff was not entitled, in my view, does not render the plea vague and embarrassing or fails to disclose a defence. The plaintiff is entitled to elicit this information by way of a request for further particulars or evidence at trial.

[60] Accordingly I find that the third ground is similarly without merit.

ORDER

[61] I accordingly make the following order: -

"The exception is dismissed with costs."



F BEZUIDENHOUT

ACTING JUDGE OF
THE HIGH COURT

DATE OF HEARING: **18 MARCH 2021**

DATE OF JUDGMENT: **16 AUGUST 2021**

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