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

CASE NO: **6490/2017**

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

Date: 7 April 2021

In the matter between:

REMICOR CONSULTING (PTY) LTD Plaintiff/Excipient

and

TRIVIRON PROJECT MANAGEMENT (PTY) LTD Defendant/Respondent

JUDGMENT

TURNER AJ:

[1] This is an exception taken by the plaintiff to the defendant's amended plea. The notice of exception records ten grounds of complaint. The plaintiff abandoned the third and fifth complaints before the hearing and, during the course of argument, the plaintiff also abandoned the first, second, seventh and ninth complaints (together the "abandoned complaints"). This leaves only the fourth, sixth, eighth and tenth complaints to be decided ("the remaining complaints"). It is not necessary for me to deal with the abandoned complaints, save in respect of my decision on costs.

[2] In the particulars of claim, the plaintiff pleads facts in relation to three alleged agreements, which I summarise as follows:

2.1 In September 2014, the plaintiff, defendant and Romh Consulting concluded the first agreement, an oral pre-bid joint venture agreement in terms of which the three entities agreed *inter alia* to pursue together, business opportunities available through various tenders. They agreed that if they were awarded a contract in respect of any completed tender, they would conclude a further joint venture agreement.

2.2 In August 2015, the Ekurhuleni Metropolitan Municipality ("EMM") awarded Contract No. PS-EMPO08/2015 pertaining to the provision of overall project management services for the municipality, which award was subject to a service level agreement being concluded with EMM. The plaintiff alleges that Romh Consulting was a specialist structural and civil engineering consultant (not a project management consultant) and was consequently excluded from the services to be provided under the awarded contract. The second agreement between the plaintiff and the defendant was an agreement that they would conclude an oral joint venture agreement in respect of PS-EMPO08/2015 .

2.3 In paragraph 10, the plaintiff pleads the third agreement, an oral agreement that it alleges was concluded in August 2015 between the plaintiff and defendant to the effect that the plaintiff and the defendant would act in joint venture in discharging all the service provider obligations arising out of contract No. PS-EMPO08/2015. The pleaded terms of that agreement identify the obligations to be discharged by the plaintiff and the defendant respectively and, of particular relevance for the current exception:

> "11.10 Insofar as further professional Built Environment Services were to be required by the EMM … the joint venture would procure such services from third party specialist Built Environment Professional Practitioners.
>
> 11.11 The income earned out of contract No. PS-EMPO08/2015 would be shared between the plaintiff and the defendant in the ratio of 50/50 (hereinafter 'the income sharing ratio').
>
> 11.12 Such income sharing ratio was to be computed after any external, or third party, expenses (hereinafter 'Third Party Expenses') had been accounted for, and deducted from the income earned …
>
> 11.14 The defendant was responsible for the preparation, and issuing of accounting records … as well as to make payments to the plaintiff, in accordance with the income sharing ratio."

[3] In its plea, the defendant denies the tripartite first agreement and also denies the second agreement, rejecting it as an "agreement to agree". In paragraphs 6-8 of the plea, addressing the third agreement, the defendant admits that a joint venture agreement was concluded between the parties but alleges that this agreement was entered into during September 2014. In pleading the terms of the agreement it alleges, the defendant confirms a number of the terms pleaded by the plaintiff including the obligation on the

defendant to maintain all accounting records, prepare and submit close-out reports and to receive and make payments.

[4] The apparent crux of the dispute between the parties on the pleaded case related to the joint venture agreement lies *first,* in the defendant's pleading in 8.2 and 8.3 where it pleads:

> "8.2 The nature of the services to be rendered would be Project Management Services (hereinafter referred to as 'PMS');
>
> 8.3 The plaintiff and the defendant would jointly and equally execute all of the PMS opportunities sourced".

and *second*, in paragraph 12 where the defendant asserts that the EMM appointment under contract No. PS-EMPO08/2015 was limited to PMS work and identifies the projects categorised the PMS work as being limited to three of the seven projects alleged by the plaintiff, those identified in paragraphs 15.1 – 15.3.

[5] Reading the pleadings as a whole, it appears that the defendant's case is that the remaining four projects identified by the plaintiff in paragraphs 15.4 – 15.7 of the particulars of claim were not PMS projects. It asserts that although these were appointments made under PS-EMPO08/2015, they were not for PMS services but civil or engineering services, and therefore fell outside of the scope of the joint venture.

[6] The essence of the dispute appears from the pleadings to be: the scope of the joint venture agreement between them; which appointments by EMM under PS-EMPO08/2015 fell within the joint venture agreement; the amount payable by the defendant to the plaintiff from the proceeds received in terms of the joint venture agreement.

Relevant Law

[7] The remaining complaints all assert that the plea is vague and embarrassing as a result of the defendant making "bald" denials and failing to provide particularity which the plaintiff alleges the defendant is obliged to provide. The following summary from Erasmus Superior Court Practice p D1-299 (read with the cases cited in the footnotes) usefully captures the test applicable in the current situation:

> :The test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows:
>
> *(a)* In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. If a statement is vague it is either meaningless or capable of more than one meaning. To put it at its simplest: the reader must be unable to distil from the statement a clear, single meaning.
>
> *(b)* If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of.
>
> *(c)* In each case an *ad hoc* ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.
>
> *(d)* The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.
>
> *(e)* The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.
>
> *(f)* The excipient must make out his case for embarrassment by reference to the pleadings alone.

> *(g)* The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness.
>
> (emphasis added)

[8] In undertaking a quantitative analysis of the embarrassment suffered by the plaintiff as a result of the vagueness in the plea, one must consider the plea as a whole to understand what the defendant does say as well as what it does not say. To my mind, the key elements in the defendant's plea are the admitted joint venture agreement, the fact that the joint venture was implemented in respect of the identified EMM contract, the defendant's admitted obligations under that joint venture agreement and the fact that it is the defendant (not the plaintiff) that seeks to draw a distinction between PMS services and other services rendered to EMM in order to justify why the full amounts received are not to be split 50/50 with the plaintiff.

[9] Where the defendant has admitted a joint venture arrangement linked to contract PS-EMPO08-15 but then sought to distinguish instructions given for PMS work from those given for architectural and civil engineering services by EMM under that same contract number, I consider that the defendant has an obligation to plead sufficient particularity in relation to the distinction which it draws to enable the plaintiff to understand the case it has to meet and to prepare for trial. Where the defendant fails to do so, prejudicial embarrassment is caused to the plaintiff.

[10] I set out the detail of each of the remaining complaints below. As all of the remaining complaints are raised on a similar basis, my decision follows after dealing with all of them.

Fourth complaint

[11] In paragraph 14 of the particulars of claim, the plaintiff alleges that the value of the projects sourced under contract No. PS-EMPO08/2015 during the period August 2015 to 22 June 2017 was R26,049,937.12 and it alleges that these projects were executed by the parties. It goes on to plead that the defendant had received payment of R20,583,808.67.

[12] In its plea, the defendant denies these allegations. In paragraph 12 of the plea (responding to paragraph 15 of the particulars of claim), the defendant records that the project sourced under the PMS work were limited to three of the seven projects listed by the plaintiff, namely Germiston, Duduza and KwaThema. It does not however provide any details of the value of those three projects or the amounts received in respect of those three projects.

[13] The plaintiff's complaint is that the defendant is obliged to plead its version of the value of the projects received in terms of the joint venture agreement and the amounts paid. It bolsters its complaint with reference to the terms of the joint venture agreement pleaded by the defendant itself *inter alia* that it was the defendant's obligation to prepare and submit progress reports, maintain accounting records and effect payments on behalf of the joint venture.

[14] *Mr Tshabalala*, who appeared for the defendant, argued that the defendant was not obliged to plead its version. He argues that the defendant is entitled, in terms of Rule 22(2) to deny the whole of the allegations made by the plaintiff, leaving the plaintiff to prove the allegations which the defendant has not admitted.

Sixth complaint

[15] In paragraphs 16 and 17 of the particulars of claim, the plaintiff pleads that it complied with its duties in terms of the joint venture agreement between August 2015 and 28 February 2017 (described as the "initial period"). It goes on in paragraph 18 to assert that "during the initial period, in relation to work done on the respective projects … the defendant invoiced EMM the … amount of R1,963,2921.27." It then attaches the invoices relied on.

[16] In response to paragraphs 17 and 18 of the particulars of claim, the defendant denies these allegations and provides no particularity.

[17] The defendant argues that it is entitled to deny these allegations because of its previous denial that the joint venture agreement covered civil and engineering work. Further, insofar as the amount asserted by the plaintiff relates to both PMS and engineering work, it says it is entitled to deny that the pleaded amount was invoiced without providing particularity of what it asserts the correct position to be.

Eighth complaint

[18] In paragraph 21 of the particulars of claim, the plaintiff pleads what it alleges to be the net income earned by the joint venture during the initial period, after deduction of third party expenses – R18,226,617.27. The defendant baldly denies this allegation for similar reasons given above.

[19] Despite having admitted that it is party to the joint venture and that it was the party responsible for payments made and received, and the party responsible for maintaining the accounting records of the joint venture, the defendant argues that it is not required to provide any particularity of what it says was earned and spent.

Tenth complaint

[20] At paragraph 26, the plaintiff makes a general allegation that it performed its duties in terms of the joint venture agreement and then it sets out the balance on the amount due to it, which it asserts remains outstanding. The defendant has pleaded a blanket denial to all the allegations in paragraph 26.

[21] As with previous objections, the defendant argues that it is entitled to baldly deny these allegations, place them in issue and to require that the plaintiff prove them. The manner in which it formulates this argument at paragraph 58 of the defendant's heads of argument, using a double negative to avoid making a positive assertion, is instructive:

> "[Defendant] denies that it has not remunerated the plaintiff in respect of what it was obliged to in terms of the joint venture agreement. It is thus incumbent on the plaintiff to prove its entitlement to the monies it alleges it was entitled to in terms of the agreement and that the defendant is refusing to make payment thereof."

[22] As appears from the defendant's argument, the issue in dispute is the extent to which the defendant was obliged, in terms of the joint venture agreement, to remunerate the plaintiff.

Decision on Complaints

[23] In my view, where the defendant is the party that was operating the joint venture, receiving the instructions and payments and allocating those payments, it is obliged to provide the particularity as to: (i) the orders and invoices which it contends relate to PMS work; (ii) the amounts which it alleges were payable to the respondent in terms of

the joint venture agreement; (iii) the amounts actually paid to the plaintiff. This is necessary for the plea to communicate a single, clear meaning to the reader.

[24] In the circumstances, I find that the plea is impermissibly vague and the lack of particularity leaves the reader unable to distil a clear, single meaning (*Venter and Others NNO v Barrit* 2008 (4) SA 639 (C) at 644 B). The extent of the vagueness and the embarrassment caused thereby gives rise to actionable prejudice where the plaintiff (and the court) is unable to identify, from the pleading, the case which the defendant intends to present at trial. Further, given the limitations on a party's ability to request particulars in relation to a denial, it is unlikely that the plaintiff would be able to obtain such particulars in a request made in terms of rule 21.

[25] In the circumstances, I find that the fourth, sixth, eighth and tenth complaints are justified and the exceptions based on these complaints are well taken.

Costs

[26] The plaintiff having abandoned six of its ten grounds of complaint does have an impact on the costs to be awarded. In my view, even though the plaintiff has been successful on the four remaining complaints, there would have been wasted costs incurred in the preparation of notices, heads of argument and for the hearing relating to the remaining complaints. In my discretion, I consider that the defendant should pay only 50% of the plaintiff's costs associated with the exception.

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

(1) The plaintiff's exceptions set out in the fourth, sixth, eighth and tenth complaints are upheld.

(2) The defendant is ordered to amend its plea to provide the necessary particularity in answer to the plaintiff's allegations in paragraphs 14, 17, 18, 21, 22, 23, 24 and 26 of the particulars of claim, within 20 days of this order.

(3) Should the defendant fail to make the required amendments, the plaintiff is entitled to return on the same papers to have the defendant's defence struck out.

(4) The defendant is liable to pay 50% of the plaintiff's costs of the exception, on the scale as between party and party.

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DA TURNER
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 9 March 2021

Date of judgment: 7 April 2021

Appearances:
On behalf of the applicant Adv A Glendinning
Instructed by: Shoba Attorneys

On behalf of the defendant Adv Tshabalala
Instructed by: Thejane Attorneys