

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

CASE NO: 37440/2019

In the matter between:

NUMILL MARKETING (PROPRIETARY) LIMITED

Plaintiff

and

COURTNEY ROOFING (PROPRIETARY) LIMITED

Defendant

(Registration No. 2007/028699/07)

JUDGMENT

TERNENT AJ

1. This matter comes before me by way of an exception, in terms of Rule 23(1), which has been taken by the defendant to the plaintiff's amended particulars of claim (as a consequence of the defendant on a prior occasion having taken issue with the plaintiff's particulars of claim resulting in the amendment). Despite the amendment to the particulars of claim, dated 15 January 2020, it has raised its second exception, dated 28 May 2020.
2. The defendant objects to the particulars of claim on two grounds, which it contends renders the particulars of claim excipiable, in the sense that

it does not disclose a cause of action and, is deserving of being set aside by this Court, with leave being granted to the plaintiff to amend its particulars of claim.

3. In considering the exceptions raised, I am required to deal with them “sensibly” and remain alive to their purpose, “weed[ing] out cases without legal merit”¹. The excipient must establish that upon every reasonable interpretation of the particulars of claim (including the documents upon which it is based) no cause of action is disclosed.²
4. The decision of *Living Heads v Ditz*³ summarises the approach a Court must take when an exception is raised. As such, I can accept the truth of the allegations in the particulars of claim, an exception is not meant to embarrass an opponent but to expose the weakness in the case so that the case will come to an end, and on any construction of the particulars of claim, no cause of action must be able to be established.
5. The first exception is directed at paragraph 5 of the amended

¹ *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (10) SA 461 SCA, paragraph 3 at pages 465-466

² *Pete's Warehousing and Sales CC v Bowsink Investments CC* 2000 (3) SA 833(E) at 839G-H

³ 2013 (2) SA 368(GSJ) at paragraph 15

particulars of claim which provides that:

- “5. During or about **03 October 2017**, and at or near **KYA SANDS**, the parties represented as aforesaid, entered into a written agreement (“the Agreement”). A copy of the Agreement is annexed hereto marked Annexure “**A**” and the Plaintiff prays that the terms thereof be incorporated herein as if specifically pleaded. Bradley Riemer, signed the Agreement on page 1 thereof. Above his signature appeared, *inter alia*, the following words: I/we hereby agree that my/our signature(s) hereto – I bind myself/ourselves in accordance with the terms and conditions on pages 2 and 3 ...” Accordingly, the terms and conditions on pages 2 and 3 are incorporated by reference and form part of the Agreement.”
6. The defendant contends that as the cause of action is contractual and relies on “a written agreement”, it must be signed by all of the parties. The agreement, Annexure “**A**” to the particulars of claim, is not the written agreement the defendant says it is because it has not been signed by the parties and more specifically, the defendant’s representative has not signed pages 2 and 3 which make provision for a signature in the right hand bottom corner of each page.

7. There is no dispute that the only signatory to the sale agreement, representing the defendant, a Mr Bradley Riemer, signed page 1 of the written agreement.
8. Furthermore, the argument goes, Mr Riemer has failed to complete the agreement on the covering page and just above his signature, which stipulates as follows:

"I/we the undersigned as ----- of the abovementioned and in my/our personal capacity warrant that, I/we am/are duly authorised to sign this agreement and that the above information is true and complete, that all the transactions will be subject to Terms and Conditions on pages 2 and 3 which I/we acknowledge having read and understood.

I/we hereby agree that my/our signature(s) hereto – bind myself/ourselves in accordance with the Term and Conditions on pages 2 and 3 as surety and coprincipal debtor in solidum with the abovementioned."

9. In essence, the failure by Mr Riemer to stipulate, in writing, the capacity in which he signs the agreement, adds to the objection.
10. The defendant says that if the plaintiff is relying on a written agreement and it is not signed by both parties, the sale agreement was not signed

and did not come into existence. As such, it could not be relied upon by the plaintiff and no contractual cause of action had been disclosed.

The respondent relied on the decision of **Goldblatt and Freemantle**⁴ as authority for this contention.

11. This point was raised, in the context of a loan agreement, which was not signed by the plaintiff, in the decision of **Investec Bank Ltd v Isinda 154 (Pty) Ltd**.⁵ Satchwell J stated that:

“14. Writing as a matter of principle and not confined to the facts of that matter, the court in *Pillay supra* stated⁶ that:

“In my opinion it is clear from *Goldblatt and Freemantle, supra*, and the authorities cited therein that, in the absence of a statute which prescribes writing signed by the parties or their authorised representatives as an essential requisite for the creation of a contractual obligation (something which does not apply here),⁷ an agreement between parties will be held not to have given rise

⁴ 1920 AD 123

⁵ 2016 JDR 1853 GJ at paragraph 15

⁶ ***Pillay and Another v Shaik and Others*** 2009 (4) SA 74 (SCA)

⁷ Nor does it apply in the case presently under consideration as in the matter before Satchwell J

to contractual obligations only (my emphasis) if there is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract can come into existence (at page 83F-H)."

12. As in the Satchwell decision, there is no suggestion that there is a pre-existing contract which requires the formality of signature before a binding contract, the written sale agreement, could come into existence. Furthermore, absent any term in the agreement that this agreement is only binding upon the parties, once signed by both parties, the point cannot be upheld.
13. Insofar as Mr Riemer's employment capacity is not inserted into the sale agreement, I do not agree that this is necessary or material to the plaintiff's cause of action.
14. Furthermore, it is clear to me that he is a director of the defendant. Mr Riemer's full personal details are set out in a block on page 1 of the sale agreement. This block is titled "*details of proprietor/partners/directors/person/members/trustees*". This block is divided into three smaller blocks titled "*full names*", "*identity number*" and "*telephone*". This has been completed manually and reflects Mr Riemer's full names, his identity number and his cell phone number. It

is clear that Mr Riemer is a director of the defendant company, as purchaser and the contracting party. The block also records the name of his co-director, Mr Ellis Harvey Coll. Directors are the very persons that represent incorporated entities, like the defendant.

15. As provided in Rule 18(6) of the High Court Rules:

“(4) A party who in his pleading relies upon a contract shall state whether the contract is written , oral, and when, where and by whom it was concluded and if the contract is written a true copy thereof or the part relied on in the pleading shall be annexed to the pleading. Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

16. The law states that:

“There is no exhaustive test to determine whether a pleading contains ‘sufficient particularity’ for the purposes of this subrule but it is essentially an issue of fact: a pleading contains sufficient particularity if it identifies and defines the issues in such a way that it enables the opposite party to know

what they are".⁸

17. In the commentary to the Rule,⁹ it is clear that the purpose of pleadings is not to set out evidence but the material facts upon which the plaintiff relies, underpinning its cause of action, which in this case is a contract for goods sold and delivered comprising a written agreement followed by orders which were made orally, as pleaded in paragraph 7 of the amended particulars of claim
18. In compliance with Rule 18(6), in paragraph 4 of the amended particulars of claim, the plaintiff pleads that Mr Riemer represented the defendant and was duly authorised to do so. The Plaintiff has, to my mind, in all respects complied with Rule 18(6), and set out the contractual basis for its claim with sufficient particularity.
19. I find that the agreement at Annexure "A" is a written agreement which can be relied upon by the plaintiff to establish its cause of action to which the defendant is well able to plead. As such, the first exception has no merit.

⁸ **Nasionale Aartappel Kooperasie Bpk v Price Waterhouse Coopers Inc** 2001 (2) SA 790 (T) at 798F-799J

⁹ Erasmus, Superior Court Practice, D1-232

20. The second exception is directed at clauses 1 and 17 of the standard terms and conditions, reflected on pages 2 and 3, of the sale agreement.

21. Clauses 1 and 17 provide:

"1. I/we undertake to pay my account within 30 days after the date of the monthly statement that will be mailed to my/our address stated as Postal address on page 1 of this agreement."

and

"17. The full purchase price as stated in the invoice shall be duly paid by me/us in South African currency without deduction, demand or set off, to you. No amount may be deducted from invoices without your written authorisation. Payment for goods supplied shall be effected on the terms set out in the invoice and such terms shall not be varied without your written consent."

22. The objection is that the plaintiff, in its amended particulars of claim, pleads that its invoices are due and payable within 30 days after the date of the monthly statement mailed to the defendant's postal address (clause 1), alternatively within the terms set out in its invoice (clause

17), and these terms are contradictory and derail the plaintiff's cause of action.

23. The plaintiff, however, goes on to clarify its terms and pleads that its invoices did not incorporate payment provisions and, as a consequence, clause 1 governs payment of its invoices, as stipulated, within 30 days of the date of its monthly statement. The plaintiff, by way of example, attaches a copy of an invoice issued to the defendant, as Annexure "B1". This invoice makes it self-evidently clear that no payment terms as provided for in clause 17 appear, other than to highlight that interest will be levied on late payments.

24. Accordingly, any ambiguity has been clarified in the particulars of claim. It is also trite that a party can plead in the alternative, and in so doing no ambiguity is created.

25. Finally, due to the developments in the law relating to the interpretation of agreements, arising from the decisions of *Endumeni Municipality*¹⁰ and being considered most recently again in *Novartis SA v Maphil Trading*,¹¹ the trial court will consider what the parties intended in

¹⁰ 2012 (4) SA 593 (SCA)

¹¹ 2016 (1) SA 518 (SCA)

concluding the sale agreement, its terms and specifically what the agreed payment terms were, and clauses 1 and 17 will be considered in the light thereof, and any ambiguity, if present, resolved.

26. In the result, sufficient particularity has been provided to the defendant as to the payment terms, to which it is well able to plead. As such, the second ground of exception also lacks merit.

27. As the defendant has not been successful in its exception, the costs must follow the result.

28. Accordingly, I grant an order in the following terms:

(1) The defendant's first and second exceptions are dismissed.

(2) The defendant is ordered to pay the plaintiff's costs.


P V TERNENT
ACTING JUDGE OF THE HIGH COURT
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DATE OF HEARING: 12 April 2021

DATE OF JUDGMENT: 28 April 2021 (handed down electronically,

uploaded to CaseLines and emailed to the parties)

APPEARANCES

Plaintiff's Counsel:
Instructed by:

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