

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

CASE NO. 29643/2021

REPORTABLE:NO
OF INTEREST TO OTHER JUDGES: NO
2 August 2022

In the matter between:

TAITZ CELLULAR (PTY) LTD T/A BLUE CELLULAR First Plaintiff
(Registration Number: 2017/052606/07)

THE TELCO GUYZ (PTY) LTD Second Plaintiff
(Registration Number: 2018/334916/07)

and

CHADEZ ENTERPRISES (PTY) LIMITED First Defendant
(Registration Number: 2015/030655/07)

CHADEZ CONNECT (PTY) LIMITED Second Defendant
(Registration Number: 2020/894704/07)

CHARLTON JOSEPHS Third Defendant
(Identity Number: [...])

JUDGMENT

NOCHUMSOHN AJ

1. This is an Application for an Exception to the Plaintiffs' Particulars of Claim.
2. The Defendants delivered a Notice of Exception dated 21 September 2021, in which the Defendants seeks an Order in the following terms:
 - 2.1. That the Defendants' Exception be upheld;
 - 2.2. That the Plaintiffs' Amended Particulars of Claim be struck out;
 - 2.3. That the Plaintiffs be afforded twenty days within which to amend its Particulars of Claim, and, should it fail to so comply, that the Defendants then be afforded an opportunity to apply to this Honourable Court on the same papers, for an Order dismissing the action;
 - 2.4. Costs of the Exception.
3. *Ex facie* the Notice of Exception, same is defective inasmuch as it has not been signed by counsel. Neither does the notice set out that the attorney who signed same, is an attorney with right of appearance in the High Court. To such end, the Notice of Exception is defective, for want of compliance with the rules of court, but not necessarily fatal to the application.
4. Paragraph 1 of the Particulars of Claim describes the First Plaintiff as Taitz Cellular (Pty) Ltd, a private company with limited liability duly registered and incorporated as such, with registration number 2017/052606/07.

5. Paragraph 2 of the Particulars of Claim describes the Second Plaintiff as The Telco Guyz (Pty) Ltd, a private company with limited liability duly registered and incorporated as such, with registration number 2018/334916/07.

6. In paragraph 9 of the Particulars of Claim, it is alleged that during or about 2015, the First and/or the Second Plaintiff and the First Defendant entered into an oral, alternatively tacit, further alternatively, partly oral partly tacit agreement. For the purposes of this Exception the terms of such agreement are irrelevant and will not be dealt with in this judgment.

7. The nub of the Exception is that it was not possible for the First Defendant to have entered into such Agreement with either the First or the Second Plaintiff. It is alleged that such impossibility arises out of the First Plaintiff having been formed in 2017 and the Second Plaintiff in 2018. The submission is that such entities could not have entered into any agreement prior to their formation, as they did not exist.

8. Implicit in the Defendant's Exception is the accompanying contention that the aforesaid dates of the Plaintiff's respective registration are both objective and pleaded facts. The Defendant is incorrect on both scores.

9. In the words of Wessels J in *Benson and Simpson v Robinson* 1917 WLD 126 "*the plaintiff must not set out the evidence upon which he relies, but he must state clearly and concisely on what facts he bases his claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet him in court and tender evidence to disapprove the plaintiff's allegations.*" This principle was echoed in the then Appellate Division in *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) (SA) 94 A 107 C/H.

10. Having regard to the provisions of rules 17 and 18, which regulates that which must be set out in a summons, and how pleadings are to be articulated, one can find no fault with the amended Particulars of Claim, as they read. The Particulars of Claim serve to set out a very detailed cause of action, with sufficient particularity to enable the Defendant to plead.

11. The general principles applicable to exceptions are summarised by the Honourable Makgoka J in *Living Hands (Pty) Ltd NO & Another v Ditz & Others* 2013 (2) SA 368 (GSJ) at 374 G. Such principles were referenced and restated by the Honourable Maier-Frawley J in *Merb (Pty) Ltd v Matthews* unreported (Case No: 2020/15069 (saflii.org/za/cases/ZAGPPHC/2020/419.html)). Such principles were quoted as follows:

“(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The object of an exception is not to embarrass one’s opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.”

12. Dealing specifically with an exception based on the contention that the pleading lacks averments necessary to sustain a cause of action, *Vermeulen v Goose Valley [2001] ALL SA 350 (A)* finds application, where it was held that “*it is trite than an exception that a cause of action is not disclosed by pleading cannot succeed, unless it can be shown that ex facie the allegations made by the plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law*”.

13. Against the abovementioned background, the ultimate test as to whether an exception should be upheld is whether the excipient is prejudiced by the purportedly offending pleading. This principle was enunciated in *Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 C at 298 A*.

14. The Defendants excepted to the Plaintiffs' Particulars of Claim on the basis that they fail to contain averments necessary to sustain a cause of action.

15. It is incumbent upon the Defendants to demonstrate that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed.

16. As things stand, the Plaintiffs have pleaded an unobjectionable and unexcipiable cause of action in relation to the Distribution Agreement, and the First Defendant's alleged breach thereof. The Plaintiffs have satisfied the requirements of pleading the material facts relied upon by them. The Defendants have a very clear picture of the case that they are required to meet. There is certainly sufficient particularity set out therein, to enable the Defendants to plead.

17. The Defendants incorrectly speculate that at paragraph 1 and 2 of the Particulars of Claim, the Plaintiffs plead that the First was registered in 2017, and the Second in 2018. This is not pleaded by the Plaintiffs, who merely set out the respective registration numbers.

18. From such registration numbers, the Defendants have erroneously speculated that the First Plaintiff came into existence in 2017, and the Second in 2018. It is these speculative assumptions upon which the Exception is predicated.

19. The Defendants' contention does not relate to a defect in the Plaintiffs' pleaded cause of action. Similarly, the Defendants' contention does not constitute an attack on the formulation of the Plaintiffs' claim.

20. On the face of the Particulars of Claim, the Plaintiffs' cause of action is complete and valid.

21. The Defendants launched their exception on an assumption and speculation which is extraneous to that pleaded.

22. There is nothing objectively apparent from the Particulars of Claim, nor in the Defendants' Heads of Argument, that substantiates the conclusion that the year referenced in a company's registration number is the specific year in which the relevant company was so registered.

23. The year of registration is not pleaded for either plaintiff, neither is this required to be pleaded in order to carve out a cause of action. The notice of exception incorrectly states that the year of registration is pleaded, which is not the case.

24. As such, the Defendants fail to satisfy, or distinguish, the considerations in *Living Hands & Merb supra*. Similarly, the Defendants fail to meet the test set out in *Vermeulen supra*. The Defendants are unable to demonstrate that *ex facie* the Amended Particulars of Claim, the claim is (not may be) bad in law. There may be a variety of reasons as to why the year listed in a company's registration number is not the actual year in which the company was registered.

25. Attached to the Plaintiffs' Heads of Argument is a report by the Companies and Intellectual Property Commission (CIPC), in respect of the First Plaintiff, which demonstrates that it was formed as a close corporation in November 2002. This

Honourable Court is called upon to take judicial notice of the fact that such report confirms that in 2017, the First Plaintiff was converted from a close corporation to a company.

26. In Argument, Adv Hoffman for the excipient, handed up a similar document in respect of the second plaintiff, reflecting the date of its formation to 8 June 2018. The argument then presented that it would not have been possible for the defendants to have concluded an agreement with the second plaintiff in 2015.

27. These arguments are speculative. I cannot take judicial notice of either of the two CIPCY forms, as proof of their respective contents. They may contain typographical errors. There is nothing to preclude the defendants from pleading an deficiencies which it may believe to be the case in respect of the registration dates of the plaintiff entities. There would be nothing to prevent the plaintiff's from replicating to any such pleaded material.

28. Mr Hoffman conceded in argument that the pleading of a companies registration number in its citation is not a requirement. Had the numbers not been set out in the citation of the Plaintiffs, there would then have been no cause for the exception.

29. As such, it is clear that evidence may well be led which would support the cause of action pleaded. In this sense, the summons is not excipiable. Conversely, the summons would only be excipiable if there was no possible evidence which could be led on the pleadings, which could disclose the cause of action, as pleaded.

30. The Particulars of Claim elegantly sets out the case which the Defendants are required to meet and plead to. If the Defendants are in doubt as to the incorporation or existence of one or both of the Plaintiffs, at the time of the conclusion of the alleged agreements, the Defendants are well able to plead a denial of such allegations. The merits of such subject matter would then be determined, after the leading of the appropriate evidence, on trial.

31. Accordingly, I find that the exception is without merit and falls to be dismissed.

32. In the circumstances, I make the following Order:

32.1. The Exception is dismissed;

32.2. The Defendants are ordered to file a Plea to the Particulars of Claim within fifteen (15) days from date of delivery of this Judgment;

32.3. The Defendants are ordered to bear the Plaintiffs' costs in relation to this Exception on the scale as between party and party.

NOCHUMSOHN, G
ACTING JUDGE OF THE HIGH COURT

On behalf of Plaintiffs: Advocate

Instructed by: AB Scarrott

On behalf of the Defendants: Advocate J Hoffman

Instructed by: Ian Levitt

Date of Hearing: 2 August 2022

Date of Judgment: 3 August 2022