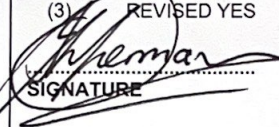


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2022/011010

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES
	<u>5/03/2023</u>
SIGNATURE	DATE

In the matter between:

LEGOGO IT AND PROJECTS CC
(Registration number: 2006/061985)

Plaintiff

and

THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY

City / Excipient

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 6 March 2023

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] Legogo, plaintiff, makes a claim on the City, which the City excepts to on the basis that the plaintiff's particulars of claim are vague and embarrassing¹. The City excepts to the particulars of claim on grounds as set out in paragraphs 1 to 8 of its exception. At the hearing, the City abandoned the ground in paragraph 5 of the exception.

[2] The exception is not signed by a legal practitioner enrolled as an advocate or an attorney with right of appearance in this court. The exception, being a pleading, on the face of it, appears to be invalid. I would dismiss the exception on this basis alone but in order to move this matter forward and for this exception not to be raised again, I deal with the substance of it.

The Claim

[3] The plaintiff instituted action against the City for an order that the City pay to the plaintiff the amount of R 53 983 187.98 plus interest and costs.

[4] The amount claimed is in respect of Revenue Enhancement Services (*'the services'*) allegedly rendered by the plaintiff to the City in accordance with an agreement concluded between the parties on 23 July 2019 (*'the agreement'*).

[5] The terms of the agreement and addenda thereto have been pleaded in the particulars of claim.

¹ Its exception was also based on the absence of a cause of action but this was not persisted with at the hearing of the exception.

Vague and embarrassing considered

[6] The court must look at the particulars of claim and decide whether it lacks particularity to the extent that it is vague and if so, whether this vagueness causes prejudice.²

Ad paragraph 1 of City's exception

[7] The first ground of exception is in respect of paragraph 4.1 of the particulars of claim wherein it is pleaded that the agreement would endure for the remainder of the three year-period stipulated under the agreement between the plaintiff and '*Thabazimbi Defendant*'.

[8] The City avers that this creates ambiguity as to who the City is and with whom the plaintiff contracted and therefore renders the particulars of claim vague and embarrassing.

[9] The City of Johannesburg Metropolitan Municipality is clearly cited as the defendant in paragraph 2 of the particulars of claim. Paragraph 3 of the particulars of claim states that the agreement was concluded with the City. Furthermore, a mere perusal of annexure POC 1 to the particulars of claim, which is the agreement, confirms that the agreement was entered into with the City. There is thus no ambiguity regarding the parties to the agreement.

[10] Paragraph 4.1 of the particulars of claim sets out the duration of the agreement concluded between the parties and refers to clause 6 of the agreement (POC 1), which

² *Komatsu K VX LLC v Allied Wear Parts (Pty) Ltd*, [2015] JOL 33955 (GJ); See too *Quilaum v McGregor* 1960 (4) SA 383 (D) at 939 F-H

clause also sets out the duration of the agreement. Any ambiguity that may have been caused by the obvious typing error of the word “Thabazimbi” before “Defendant” at paragraph 4.1, is clarified by a mere reading of clause 6 of the agreement.

[11] I thus find that there is no vagueness but if I am wrong on that, there is certainly no prejudice that flows from this obvious typographical error.

Paragraphs 2, 3 and 6 of the exception

[12] The City avers that the plaintiff failed to plead specifically which clauses of the agreement sets out the material terms of the agreement as pleaded at paragraphs 4.10, 4.13 and 11 of the particulars of claim.

[13] These terms of the agreement relate to: unresolved disputes between the parties – pleaded at paragraph 4.10 of the particulars of claim; breach of the agreement – pleaded at paragraph 4.13 of the particulars of claim; and invoices that are payable within 30 days from date thereof – pleaded at paragraph 11 of the particulars of claim.

[14] A reading of the agreement annexed as POC 1 would reveal which clauses of the agreement provide for unresolved disputes, breach and payment of invoices within 30 days (clauses 24.3, 23 and 15.4 of the agreement). Also, at paragraph 4.12 of the particulars of claim, the plaintiff pleads that invoices are payable within 30 days in terms of clause 15.14 of the agreement.

[15] The plaintiff has pleaded the conclusion of the agreement and the material terms thereof. It did not have to refer to every clause of the agreement by name and number, which it did in most instances but was not obliged to. In *Imprefed (Pty) Ltd. v National Transport Commission*³ the Appellate Division (now the Supreme Court of Appeal) held that:

³ (13/91) [1993] ZASCA 36; 1993 (3) SA 94 (AD); [1993] 2 All SA 179 (A) (22 March 1993)

'[I]t need hardly be stressed that:

"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."

(Durbach v Fairway Hotel Ltd 1949(3) SA 1080 (SR)1082.

This fundamental principle is similarly stressed in Odgers "Principles of Pleading and Practice in Civil Actions in the High Court of Justice" (22nd ed) 113:

"The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision."

The degree of precision obviously depends on the circumstances of each case. More is required when claims are based upon the provisions of a detailed and complex contract, in which numerous clauses confer the right to additional payment in differing circumstances-a contract, moreover, in which such payments are to be determined, calculated and claimed in different ways depending on which clause is relied upon. In addition, as already pointed out, the contractor may choose to base the cause of action on some common law ground (breach of contract, enrichment or delict) quite unrelated to any additional payments for which the contract provides. Particularly in this context, it goes without saying that a pleading ought not to be positively misleading by referring explicitly to certain clauses of the contract as identifying the cause of action when another is intended or will at some later stage - in this case at the last possible moment - be relied upon. As it was put by Milne J in *Kali v Incorporated General Insurances Ltd* 1976(2) SA 179(D) at 182A:

"... a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another."

[16] There seems no likelihood of that form of prejudice arising here and in my view the clauses relied upon in the cause of action, given the nature and complexity of the contract in question, have been quite adequately identified, using the considerations

discussed in *Imprefed*, to cause no embarrassment or prejudice to the City. The test for excipiability is thus not cleared.

Ad paragraph 4 of the exception

[17] The City further takes issue with paragraph 9 of the particulars of claim where the plaintiff pleads that it duly performed the services in terms of the agreement, which services are set out in the invoice annexed as POC 4. The City states that the plaintiff has not stated when the services were rendered, what the services were and in terms of which clauses of the agreement the services were rendered. The City further complains that POC 4 refers to an annexure that has not been annexed.

[18] The services rendered by the plaintiff in terms of the agreement are pleaded at paragraphs 4.2 to 4.3 of the particulars of claim. To the extent that further particularity may be strictly necessary the particulars sought may be obtained via a request for trial particulars.

[19] In *Jowell v Bramwell-Jones and Others*,⁴ a useful decision on exceptions based on the vague and embarrassing ground of complaint, the relevant part of Heher J's (as he then was) judgment is adequately summarised in the headnote to that case as follows:

“When the lack of particularity related to mere detail, the City's remedy was to plead to the averment made and to obtain the particularity required either by means of the discovery/inspection of document procedure or by means of a request for particulars for trial of those particulars strictly necessary to enable the City to prepare for trial. ‘

[20] At paragraph 9 the plaintiff pleads that the services were performed in terms of the agreement. It did not have to repeat the services. Annexure POC 4 further states when the services were rendered, from 6 March 2020 to 10 December 2021. The

⁴ *JOWELL v BRAMWELL-JONES AND OTHERS* 1998 (1) SA 836 (W), confirmed on appeal at (543/97) [2000] ZASCA 16; 2000 (3) SA 274 (SCA); [2000] 2 All SA 161 (A) (28 March 2000)

plaintiff clearly pleaded what services were rendered, that such services were rendered in terms of the agreement and when the services were rendered. To the extent that the complaint is one of lack of detail the answer to that complaint lies in the above quoted passage from *Jowell v Bramwell Jones* (supra).

Ad paragraph 7 of exception

[21] The City alleges that the payment terms as pleaded by the plaintiff are contradictory. Paragraph 4.6 and 4.7 of the particulars of claim without any ambiguity sets out the way fees due to the plaintiff were to be calculated in respect of unmetered services (paragraph 4.6) and metered services (paragraph 4.7).

[22] The terms of the agreement relating to invoicing, once the fees are ascertained, are pleaded at paragraphs 4.8 to 4.12 of the particulars of claim.

[23] The allegations contained in paragraphs 9 to 11 of the particulars of claim are clear and there is no reason why the City cannot plead thereto. These allegations accord with the provisions of the agreement which is attached to the particulars of claim.

Ad paragraph 8 of exception

[24] Finally, the City, complains that the particulars of claim fail ‘*to identity the appropriate remedy in law under which the claim has been brought*’. A plaintiff is not obliged to label its cause of action *Davidson v Bonafede*.⁵

[25] In any event, the plaintiff’s claim is clearly is based on contract. The plaintiff is seeking performance of the agreement. It alleges it has complied with its obligations. There is nothing unclear about what the plaintiff is claiming or why.

⁵ 1981 2 SA 501 (C) at 505

Costs

[26] In paragraph 17.5 of the City's heads of argument, reference is made to the contents of a letter addressed to the City's attorney, which was sent by the plaintiff's attorney in an endeavour to avoid an unnecessary exception being taken.

[27] This should not have been referred to by the City but, since it has been referred to, the plaintiff contended that it is proper to place the letter before this Court - and it was. This Court did not have regard to it for purposes of deciding whether the particulars of claim were excipiable.

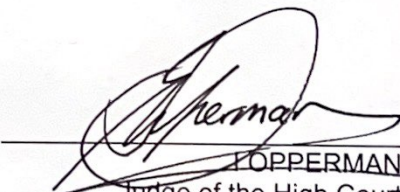
[28] However, it is relevant regarding costs in that it is clear that the City's persistence with the exception was, in the circumstances of this case, unreasonable. The persistence with the meritless exception at the expense of the citizens of Johannesburg ought to have attracted a punitive costs order but was neither sought by the plaintiff nor traversed by the court during the hearing and is thus not considered.

[29] I hold the view that the employment of two counsel, one of which is a senior, was warranted having regard to the amount involved.

Order

[30] I accordingly grant the following order:

The exception is dismissed with the City to pay the costs of two counsel where so employed, including the costs of senior counsel where applicable.


POPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the City : Adv AM Mtembu
Instructed by : Padi Incorporated Attorneys
Counsel for the plaintiff : Adv FH Terblanche SC with him Adv F Storm
Instructed by : Martinson Incorporated
Date of hearing : 21 February 2023
Date of Judgment : 6 March 2023