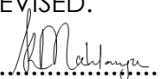


IN REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 31194/2020

1)	REPORTABLE: NO
2)	OF INTEREST TO OTHER JUDGES: NO
3)	REVISED.
	
DATE: 5 NOVEMBER 2021	
MAHLANGU SK	

IN THE MATTER OF:

TINISSA TRADING 170CC

PLAINTIFF

(Registration NO: 2008/141882/23)

and

VALOWORX 266CC

FIRST DEFENDANT

(Reg. number: 2011/101589/23)

JACQUES VAN DER WESTHUIZEN

SECOND DEFENDANT

(Identity Number: 800331 5299 087)

JUDGMENT

INTRODUCTION

- [1] This matter relates to an exception raised by Valoworx 266 CC (hereinafter called “Valoworx” and Mr Jacques van Der Westhuizen (hereinafter called “Van Der Westhuizen”) as defendants, against Tinissa Trading 170CC(hereinafter called “Tinissa”) as the Plaintiff, on the basis that the Plaintiff`s particulars of claim are vague and embarrassing. Parties will be referred to by their names. The exception dated 8 December 2020, was preceded by a Notice of Exception which sought to impugn the Plaintiff (Tinissa) `s Particulars of Claim dated 2 November 2020, as amended.
- [2] On 8 December 2020, the Plaintiff s attorneys addressed a letter to the Excipients` attorneys, indicating that the causes of complaint in the Exception Notice were groundless and would therefore not be remedied. On the same day the Excipients delivered their Exception which forms the basis of the matter which is now before this Court. The four grounds of exception contained in the Exception Notice dated 8 December 2020 are set out below.

FACTUAL BACKGROUND

- [3] At the beginning of 2018, a dispute erupted between the parties flowing out of an agreement reached between the parties. In terms of the agreement, Valoworx appointed and requested Tinissa Trading to source supplies for moulds and samples of certain motor vehicle parts. Valoworx required Tinissa to supply these motor vehicle parts to Valoworx as soon as Tinissa had identified suppliers and had the moulds and samples made. These would be inspected and approved as correct by Valoworx. Valoworx would then place immediate orders with Tinissa to supply the various parts as approved by it.
- [4] The parties further agreed that Valoworx shall pay Tinissa for the costs and any ancillary costs of sourcing the supplies, the making of moulds to manufacture parts and the actual parts manufactured as samples.

- [5] In good faith, Tinissa alleges that it performed in terms of the agreement reached between the parties. In other words Tinissa fully complied with all the terms and conditions of the agreement between the parties. Tinissa further alleges that, Valoworx has to date not placed any orders as agreed nor has it paid Tinissa for the costs incurred by Tinissa to source supplies. Consequently, Tinissa further alleged that Valoworx has breached the agreement. Valoworx failed to pay Tinissa the first instalment of R300 000,00 by 7 April 2020. Upon demand, Van der Westhuizen paid Tinissa an amount of R150 000,00.
- [6] The parties subsequently expressed their wish to amicably settle all the matters pending or future, including all the proceedings of whatsoever civil nature that Tinissa may have against Valoworx. The parties have also agreed to be bound by this agreement.
- [7] In its summons, Tinissa , claims the relief on the grounds set out below.
- [8] In Claim 1, Tinissa claims payment of an amount of R800 000, including interest at the rate of 9% per annum and costs of suit;
- [9] In Claim 2, Tinissa seeks an order in terms of which Valoworx shall take all the necessary steps to enter into a supply agreement with it under the terms of the written settlement agreement and the written addendum thereto as well as the costs of suit;
- [10] As an alternative to Claim 2, in the event that Van der Westhuizen fails, neglects or refuses to enter into the Supply Agreement grant within 7 days of the grant of an order directing it to do so, Tinissa claims from the Valoworx and Van der Westhuizen, jointly and severally, payment in the amount of R50, 716, 260, 00 and interest on the amount of R50, 716 260.00 at a rate of 10.25% per annum *a temporae mora*.
- [11] Tinissa has set out the following basis for these claims:
- 11.1 Valoworx failed to pay Tinissa the first instalment of R300 000, 00 by 7th April 2020.
- 11.2 Upon demand Van der Westhuizen paid the plaintiff R150 000, 00.

11.3 Despite further demand Valoworx, alternatively Van der Westhuizen failed to pay the balance.

11.4 The Defendants failed to provide the Tinissa with a supply agreement in terms of the written settlement agreement and the addendum.

APPLICABLE LEGAL PRINCIPLES

[12] Rule 23 (1) provides that:

‘Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case maybe, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of sub-rule (5) of Rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing, he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.’

[13] According to Rule 23 the above can be explained as follows that:

- (a) the ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced to the extent that he or she is unable to plead or to the pleadings to which he or she has excepted to.
- (b) the onus is on the excipient to show that the particulars of claim are either vague and embarrassing or lack the necessary averments to sustain a cause of action.

[14] Rule 18 provides that:

“(4) Every pleading shall contain 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.”

- [15] In **Trope v South African Reserve Bank and Another and Two Others 1993(3) SA 264(A) at 273-B**, Appellate Judge Grosskopf, JA outlined the requirements as follows:

*“It is trite that a party has to plead with sufficient clarity and particularity the material facts upon which he relied for the conclusion of law he wishes the Court to draw from those facts (**Mabaso v Felix 1981(3)SA 865 (A) at 875A-H**, Rule 18(4). It is not sufficient, therefore to plead a conclusion of law without pleading the material facts giving rise to it. (**Radebe and Others v Eastern Transvaal Development Board 1988(2) SA 785 (A) at 792j-793G**).”*

THE FIRST GROUND OF EXCEPTION

- [16] Valoworx contended that Tinissa averred in its amended particulars of claim that Tinissa would supply certain commodities to Valoworx until 2020. Further, it would after 2022 continue to supply the various parts to Valoworx until 2032. According to Valoworx this is contrary to what Tinissa pleaded in paragraphs 4.5.1 and 4.5.2 of the particulars of claim.
- [17] Valoworx further contend that is unclear how Tinissa would supply the parts to Valoworx until 2020 upon approval and then two years thereafter continue to supply the parts for the next ten years. Valoworx contend that these pleas by Tinissa are contradictory to such an extent that they are vague and embarrassing and impossible to plea thereto.
- [18] This Complaint has merit due to the fact that the Tinissa’s averments are contradictory to each other, to the extent that they are vague and embarrassing, makes it impossible for the defendants to plead thereto. There are no details of clear logical steps or rather path as how Tinissa (the Plaintiff) will supply the parts to Valoworx (the Defendants) until 2020 upon approval and then two years

thereafter continue to supply the parts for the next ten years. These facts should be articulated in detail by the Plaintiff (Tinissa) so that the defendant will be able to plead thereto. As a result this ground of exception stands to be upheld.

THE SECOND GROUND OF EXCEPTION

- [19] Valoworx contends that Tinissa acted contrary to a document that it relies upon by pleading that it has a claim, whereas the document that Tinissa relies upon contains clauses that the parties agreed to dismiss or effect dismissal of any claims existing or pending relating to any and all claims, including arising out of the settlement agreement.
- [20] Valoworx further contends that Tinissa's claims are contradictory to the agreement relied upon and makes it vague and embarrassing and impossible to plea to.
- [21] There is merit on the ground of this complaint that the claims are contradictory to the agreement and therefore makes it impossible for plea to the amended particulars of claim.
- [22] In the matter before the court, the Plaintiff, Tinissa had signed a settlement agreement of which one of the conditions or rather clauses were as follows: "The Parties hereby irrevocably releases (sic) and forever discharges (sic) each other from any future claims arising from the agreement that was reached. Valoworx irrevocably and forever waives all rights it may have arising under law with respect to the Pending Litigation and the above release."
- [23] Tinissa is bound by the condition it had in its own contract which it later signed. It cannot later act as if there was no contract. It cannot come now conduct itself differently and plead something contrary to what it had contracted itself into. The contradiction in the pleading renders the amended particulars of claim to have more than one meaning, which obviously prejudices the defendant, Valoworx in terms of pleading thereto. Therefore the ground of exception is upheld.

THE THIRD GROUND OF EXCEPTION

- [24] Tinissa has pleaded that Valoworx breached its obligations to enter into a mutually acceptable supply agreement with it.
- [25] Valoworx contends that it is incompetent to claim damages for a pre-agreement to enter into an agreement. To the extent that the second agreement was not concluded, there is no agreement between the parties upon which to base damages. Valoworx further contends that Tinissa does not disclose a cause of action and the claim is bad in law and the pleadings are excipiable. Therefore claim three stands to be dismissed on that basis alone.
- [26] This complaint has merit in that the second agreement was not concluded and therefore there is no agreement between the two parties upon which to base those damages. The result is that a cause of action has not been disclosed.
- [27] The main question to be asked is whether does Tinissa base its claim on a contract that does not exist or does it base its claim on a delict, that being a failure to enter into a contract? If it is based on a contract to be drawn up, then Tinissa would have a problem as to what are the terms of that future hypothetical contract would be or entail?
- [28] If Tinissa bases its claim on a delict, then it really failed to set out the facts of that delictual claim. Wrongfulness must be established. The law is generally slow to recognise pure economic claims where it would constitute an extension of the law of delict.
- [29] In **Trope** (*supra*) the Appeal Court stated at page 21 that: 'It is trite law that a party has to plead with sufficient clarity and particularity the material facts upon which he relies for the conclusion of law he wishes the court to draw from those facts. This was also stated in **Mabaso v Felix** (*supra*), Rule 18(4).
- [30] It appears that Tinissa wants to extend the law of delict to include a fictitious or hypothetical contract based on a pre-agreement of which will cause problems in our law. If there is no contract in existence, no one can be allowed to claim on a non-existent contract.

[31] It is trite that you cannot claim damages for a pre-agreement to enter into an agreement. If the second agreement was not concluded, therefore, there is no agreement between parties upon which to base damages. Therefore, this ground of exception stands to be upheld.

THE FOURTH GROUND OF EXCEPTION

[32] Valoworx contends that Tinissa pleads for specific performance for a party to enter into an agreement and for the court to force a party to conclude a contract.

[33] Valoworx contends that Tinissa does not disclose a cause of action and the claim is therefore bad in law. He further contends that the pleadings are excipiable and the claim stands to be dismissed on this basis alone.

[34] There is merit in this complaint as the plea does not disclose a cause of action which becomes, therefore excipiable. It is not in dispute that a decree of specific performance is one of the most important equitable remedies. It is further, not in dispute that specific performance is a court order directed to someone who is a party to a contract to instruct him/her to perform his/her obligations under the contract. The question is whether the Plaintiff, Tinissa base its claim for a specific performance on a contract that does not exist? The plea does not disclose a cause of action and is therefore excipiable. The exception is therefore, upheld.

CONCLUSION

[35] In the light of the foregoing, I am of the view that Tinissa`s Particulars of Claim are vague and embarrassing and do not disclose its cause of action. Therefore, Valoworx and Van der Westhizen will be prejudiced if they plead to such Particulars of Claim. Therefore, the defendants' exception stands to be upheld.

Accordingly, **IT IS ORDERED THAT:**

1. The exception is upheld with costs;
2. The Particulars of Claim are struck out.
3. The Plaintiff shall deliver new particulars of claim within 10(ten) days of the date of this judgment, failing which it will be barred to deliver same.



MAHLANGU AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA
SOUTH AFRICA

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REF: BOUWER/H/H10836V

Date of Hearing: 6 May 2021

Date of Judgment: 5 November 2021