

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

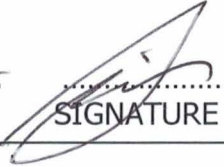
(GAUTENG DIVISION, PRETORIA)

CASE NO: 2021/37505

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

11/11/2022
DATE


SIGNATURE

In the matter between: -

THE TRUSTEES OF THE TIME BEING OF

Excipient

THE INDEPENDENT DEVELOPMENT TRUST

and

DEALFLOW ACQUISITIONS (PTY) LTD

Respondent

DEALFLOW ACQUISITIONS (PTY) LTD

Plaintiff

REGISTRATION NO: 2010/007602/07

And

THE TRUSTEES OF THE TIME BEING OF

Defendant

THE INDEPENDENT DEVELOPMENT TRUST

JUDGMENT

INTRODUCTION

[1] The Excipient (Defendant) noted an exception to the Plaintiff's particulars of claim as amended on the basis that it lacks the necessary averments to sustain a cause of action and that the said particulars of claim are vague and embarrassing.

Parties in this matter will be referred to as they are in the main action for the sake of clarity. i.e Plaintiff and Defendant.

[2] The grounds relied upon by the Defendant are the following: -

- a) That there is a discrepancy in who is alleged to have concluded the Professional Client Service Agreement (PROCSA).
- b) That there is no lis / dispute between the Plaintiff and the Defendant;
- c) The third exception is that the exception has been instituted in the wrong court.

- d) That the Plaintiff has instituted the proceedings in the wrong forum.
- e) The fifth exception is that the Plaintiff's action has prescribed.

The Plaintiff in resisting the exception raised a point in limine to the effect that the Defendant failed to comply with Rule 23 (1) (a) of the Uniform Rules of Court. It is contended by the Plaintiff that the purported grounds of exceptions as tabulated by the defendant are baseless in law or fact.

- [3] The background to this matter can be summarized as follows: -

The Plaintiff caused the summons to be issued against the defendant during 29 July 2021. A notice to defend was filed on or about the 16 August 2021. The plaintiff amended its particulars of claim in line with Rule 28 of the Rules and served and filed the amended particulars of claim on the defendant on or about 27 September 2021. An exception was noted and served on the Plaintiff during 27 September 2021.

- [4] The issue to be determined in this application is whether the grounds relied upon by the defendant are sufficient to sustain an exception. Put differently, whether the plaintiff's particulars of claim as amended do not disclose cause of action and that they are vague and embarrassing.

APPLICABLE LEGAL PRINCIPLES

The law relating to exceptions

- [5] Exceptions are dealt with in terms of Rule 23 (1) of the Uniform Rules of Court. The purpose of the exception procedure is to avoid the leading of unnecessary evidence and to dispose a case in whole or in part in an expeditious and cost effective manner.

In **Colonial Industries Ltd .V. Provincial Insurance Co Ltd 1920 CPD 627** at 706 the court held that

"... the form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed, its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings it also serves as a means of taking an objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing"

Rule 23 (1) provides as follows: -

- [6] Where any pleading is vague and embarrassing or lack averments which are necessary to sustain an action or defence, as the case may be the opposing party, may within period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraphs (f) of sub rule 4/5 of Rule 6, provided that where a party intends or 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 10 days from the date on which a reply to such a notice is

received or from the date on which such reply is due, deliver his exception.

See **Kahn .V. Stuart 1942 CPD 386 at 392**

- [7] It is upon the excipient (defendant) to show that a pleading is excipiable. The excipient (defendant) must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it.

See **Southernpoort Developments (Pty) Ltd .V. Transnet Ltd 2003 (5)**

SA 665 (w)

POINT IN LIMINE

- [8] The plaintiff argues that it was not afforded an opportunity to remove the cause of complaint by the defendant as prescribed in Rule 23 (1) (a) as the defendant's first and second exceptions are grounded on the particulars of claim being vague and embarrassing and not disclosig a cause of action.

- [9] It is clear and apparent that gleaning from the defendant's application, the plaintiff was not afforded the necessary chance to remedy the defendant's first and second grounds of exception.

Rule 23 (1) (a) makes it peremptory that the plaintiff shall be afforded 15 days to remove the cause complaint of when a party takes an exception based on a pleading being vague and embarrassing.

[10] The non-compliance with the provisions of Rule 23 (1) (a) cannot simply be ignored. I regard such contravention in a serious light as it goes to the root of the first and second grounds of the defendant's exceptions.

The point in limine is accordingly upheld and I find that failure to comply with the provisions of Rule 23 (1) (a) is premature.

[11] The defendant contended that the particulars of claim herein are vague and embarrassing and do not disclose a cause of action in that: -

The plaintiff stated in its particulars of claim that the defendant was represented by **Mqodiso Makupula** and the plaintiff by **Mzwandile Gcelu** when the parties concluded PROCSA, and the effect of the alleged discrepancy has a fatal consequence on the plaintiff's cause of action.

[12] It is further alleged that the plaintiff's particulars of claim lacks the necessary particularity as required by Rule 18.6 of the Rules of Court. The defendant is of the view that it cannot distill a clear and a single meaning as to who represented the parties without causing an embarrassment to itself which is prejudicial to its case.

[13] According to the defendant, the plaintiff in its particulars of claim, paragraph 8.5 thereof was supposed to proof where its invoices were sent to and who approved the said invoices as correct and to enable the defendant to settle the invoices in question.

The defendant alleged that paragraph 8.5 of the particulars of claim is meaningless and is thus vague and embarrassing and prejudicial to its case. In the absence of proof of who the invoices were sent to and proof of receipt and approval thereof, the said invoices are not due and payable and as such there is no dispute between the parties and the plaintiff's particulars of claim are thus excipiable.

- [14] In response the plaintiff stated that the defendant mentioned that it was represented by **Lwazi Jakavula** while **Mqodiso Makapula** represented the defendant.

The PROCSA however reveal that the plaintiff was represented by **Mzwandile Gcelu**.

The plaintiff contended that nowhere in the PROCSA it is indicated that the plaintiff was represented by the alleged **Lwazi Jakavula**.

The plaintiff refuted the allegations that it made any contradictory statement as to who represented it in the PROCSA.

- [15] It is the plaintiff's contention that the PROCSA relied upon by the defendant was not signed and forwarded to the defendant. As to who represented the parties in the conclusion of their agreement is a matter of evidence so argued the plaintiff. The plaintiff's argument is that in terms of its amended particulars of claim, paragraph 8.5 does not exist and as such the exception based on paragraph 8.5 is also not existing. Even as it may be argued that the defendant is actually

referring to paragraph 9.5 of the particulars of claim, the defendant was supposed to have complied with Rule 28 of the Rules of Court which it failed to do. The plaintiff called for the dismissal of the first and seconds grounds of the defendant's exception with costs.

[16] The principles applicable to vague and embarrassing exceptions were said to be the following: -

- i. That the pleading is vague and embarrassing if it is either meaningless or capable of more than one meaning, it involves a quantitative assessment.
- ii. The embarrassment must be serious so as to cause prejudice to the excipient if he / she is compelled to plead to the pleading.
- iii. The excipient must prove the embarrassment and prejudice.
- iv. Reference must only be made to the pleadings alone when the case for exception is made.
- v. That the admission of one or two sets of contradictory allegations in the plaintiff's particulars of claim would destroy the plaintiff's cause of action.

See **Nasionale Aarappelkooperasie BPK .V. Pricewaterhouse Coopers 2001 (2) SA 791 T.**

See **Levitan .V. Newhaven Holiday Enterprises cc 1991 (2) SA (c) at 298 J and 300G**

- [17] The test for an exception to succeed is for the excipient to establish that the pleading is excipiable on every interpretation that can reasonably be attached to it and that the excipient is prejudiced.

The court held in **Madlala .V. City of Johannesburg and another 2019 JOL 41601 (GJ)** that in deciding an exception a court will consider the facts alleged in the pleadings as correct unless they are palpably untrue or so improbable that they cannot be accepted. A court will only allow an exception based on a pleading being vague and embarrassing if the excipient will be seriously prejudiced if the complaint is not removed.

- [18] The plaintiff submitted that the defendant's intention in instituting the exceptions is intended to delay the plaintiff's case. Having considered the facts, the principles and the law pertaining to exceptions to determine whether the plaintiff's particulars of claim are vague and embarrassing, I came to the following conclusion: -

The plaintiff's particulars of claim in my view contains the cause of action which it relies on and the defendant will be able to plead as there is sufficient material facts necessary to be proved in the hearing of this matter.

The contention that there is a discrepancy as to who concluded the PROCSA between the parties cannot be supported as the Defendant failed to show any contradictions in the particulars of claim which have the effect of destroying the Plaintiff's cause of action. It is apparent that the defendant is not certain about

who represented the parties as the papers before court indicate different parties to what the defendant alleges as a discrepancy.

The defendant's reference to paragraph 8.5 of PROCSA which is non existing and to argue that it cannot thereof distill any meaning thereto and as such the plaintiff's pleading is vague and embarrassing is not based on any facts.

I find that the Defendant is not prejudiced as the Plaintiff's particulars of claim are not vague and embarrassing as the plaintiff has pleaded a complete cause of action. The defendant did not discharge an onus bestowed on it that upon every interpretation in the Plaintiff's pleading no cause of action has been disclosed.

The defendant's third exception is premised on the ground that this court lacks jurisdiction to entertain this matter. It is contended by the defendant that their agreement, PROCSA, was concluded in Port Elizabeth and the parties' addresses are also situated in Port Elizabeth and therefore the Port Elizabeth High Court is seized with jurisdiction as the cause of action occurred in its area of jurisdiction.

The defendant argues that the plaintiff's particulars of claim are excipiable as they do not disclose a cause of action.

- [19] On the other hand the plaintiff submitted that the summons were duly served in Pretoria at the defendant's head office which falls within the geographical jurisdiction of this court. The plaintiff argues that the defendant's assertion that a court can only have jurisdiction in a place where the cause of action arose, in my opinion is not correct. The plaintiff averred that it has clearly mentioned that this

court has jurisdiction to hear this matter in that the principal place of business of the defendant falls within the jurisdiction of this court. It is further argued that the place where the cause of action arose is only but one element that can grant the court jurisdiction. The Plaintiff's view is that the fact that parties in an agreement has listed their addresses does not necessarily make such an address a chosen domicile for purposes of litigation. It is argued that the parties' PROCSA did not state that the addresses as provided are the chosen domicile for purposes of litigation. Accordingly the defendant's exception on jurisdiction has to be dismissed as it is not sustainable.

[20] Section 21 of the Superior Courts Act 13 of 2013 provides that a High Court has jurisdiction over all persons residing or being in and in relation to all causes arising within its area of jurisdiction.

It is common cause that the defendant's head office is situated in Pretoria which is within this court's area of jurisdiction. The common law provides that one of the most factors to be considered when dealing with the issue of jurisdiction is the doctrine that the issue of jurisdiction depends upon the power of court to give an effective judgment to issues before it.

See **Steytler No .V. Fitzgerald 1911 AD 205 at 346**

[21] My view is that since the defendant's head office is within thus court's area of Jurisdiction and the inherent power this court enjoys, this court is empowered to

deal with this matter. I find that effective judgment can be given by this court and it thus have jurisdiction to entertain the present case. The defendant's exception on jurisdiction stand to be dismissed as the defendant did not succeed in showing that this court lacks jurisdiction.

- [22] In the fourth exception, the defendant contended that the Plaintiff instituted its action in a wrong forum. The defendant refers to clause 18 of their agreement (PROCSA) that any aggrieved party to their agreement is to first issue a letter of demand and if there is no satisfactory response to the letter of demand, refer the dispute to mediation and thereafter to arbitration. Instead of the plaintiff complying with the provision of clause 18 of PROCSA, it approached the High Court to adjudicate the parties' dispute.

The defendant argues that this court does not have jurisdiction to entertain the plaintiff's claim and particulars of claim is thus excipiable.

- [23] It is disputed by the plaintiff that referral of the dispute either to mediation and later to arbitration after the issuing of the letter of demand is a matter cast in stone in terms of clause 18 of PROCSA. Clause 18 of PROCSA provides as follows: -

"Should any dispute whatsoever arise between the parties, then either party may declare a dispute by delivering notice of details thereof to the other party which dispute shall be referred to mediation prior to arbitration".

[24] Careful reading of clause 18 of PROCSA does not make it mandatory that in the event of a dispute between the parties, it must refer the dispute to mediation and thereafter to arbitration. In order for the defendant to rely on the interpretation of their agreement, it has to demonstrate that it is ambiguous which I find that the defendant did not succeed to do. I find that there is no basis to the contention that this Court lacks the necessary powers and jurisdiction to entertain the parties' action. This court has inherent power and is in a position to give effective judgment instituted in this matter.

The defendant failed to demonstrate that the plaintiff's particulars of claim are excipiable based on its forth exception and it is therefore dismissed.

[25] The fifth exception is premised on the allegation that the plaintiff's claim has prescribed. In support of its contention, the defendant stated that the plaintiff does not provide proof that it indeed submitted its invoices on the 2 September 2018 and to whom it was sent to. The defendant argues that since the only invoices allegedly sent to the defendant are dated 10 January 2017, the plaintiff's claim expired on 11 January 2020. It is further alleged by the defendant that the letter of demand from the Plaintiff's attorneys was sent on 22 June 2021 after one year and five months and it was thus dispatched too late. The defendant submitted that the plaintiff's particulars of claim are excipiable as they do not contain sufficient averments to sustain a cause of action in respect of the said invoices.

[26] The response of the plaintiff is that the defendant seems not to understand what the law of prescription provides for.

The plaintiff averred that it stated in paragraph 11 of its particulars of claim that its invoices were sent and approved by the defendant on the 2 September 2021.

The plaintiff stated that the parties herein agreed that invoices for services rendered and disbursements incurred, would be settled not later than 30 days after the accepting or approving of the invoices as correct and final.

It is indeed correct that the due date of the invoices sent on 02 September 2018 would be 30 days after being accepted and approved, that is 2 October 2018 paragraph 9.5 of the plaintiff's amended particulars of claim, it is stated clearly that invoices would be settled 30 days after the acceptance and approval of the invoices sent to the defendant.

In my view the debt owed by the defendant to the plaintiff became due on the 2 October 2018.

It is settled law that the prescription of debt starts to run when payment becomes due. The cause of action in this matter therefore arose on the 2 October 2018.

[27] According to the papers before this court, summons was issued and was served on the defendant during 29 July 2021 before it could prescribe on the 2 October 2021.

I find that the plaintiff's claim has not prescribed as alleged by the defendant.

The contention by the defendant that the plaintiff's particulars of claim lack the necessary averments to sustain a cause of action against the defendant is rejected and is therefore dismissed as the claim has not prescribed as alleged.

COSTS

[28] It is submitted by the defendant that should the court uphold the third and fourth exceptions, the plaintiff's entire claim be dismissed with costs.

The Plaintiff is of the view that the purpose of launching of this application is just to delay the hearing of this matter as the defendant's grounds for the exceptions are bad in law. Failure by the defendant to afford the plaintiff an opportunity to remove the cause of complainant makes the exception premature. As such the plaintiff prays that the exceptions be dismissed with a punitive costs order.

[29] The issue whether to award costs is primarily based on two basic rules namely: -

1. That the award of costs is a matter of judicial discretion by the court;
2. That the successful party should as a general rule be awarded costs.

See **Fripp .V. Gibbon and Company 1913 AD at 354 – 347**

[30] The court has to consider all the facts of each case when exercising its discretion and has to be fair and just to all the parties.

An award of costs on a punitive scale will not be easily granted by the court unless there are exceptional and appropriate circumstances warranting the court to do so. The court will award costs on the punitive scale in order to penalize

dishonest, improper, fraudulent reprehensible vexatious, frivolous, malicious, reckless or a party has committed a grave or blameworthy conduct in the conduct of the case.

See **Van Dyk .V. Conradie 1963 (2) SA 413 at 418 E-F**

See also **Madyibi .V. Minister of Safety and Security 2008 JDR 0505 (TK) at paragraph 31.**

It is clearly discernible from the papers filed of record that the defendant omitted and failed to comply with the provisions of Rule 23 (1) (a) of the Rules of Court. The defendant did not afford the plaintiff the opportunity to remove the cause of complaint in his exception application.

This court takes a very dim view for non-compliance with the Rules of Court without any reasonable justification to do so.

Non-compliance with Rule 23 (1) (a) is not only premature but fatal as reliance to the first and second grounds of the exception are based on the grounds that such particulars of claim are vague and embarrassing and that no cause of action is disclosed. The defendant's grounds in my view are not sustainable.

The third, fourth and fifth grounds for the exception are with respect bad in law as there are no legal basis that the plaintiff's particulars are excipiable.

*[31] After considering all the facts in this application, a punitive costs order is warranted against the defendant. I find that the conduct of the defendant is not

only slack, blameworthy but also reckless as in my view, there is no basis in law or fact to justify any of the grounds relied upon by the defendant.

The purpose of an award of costs to a successful litigant is to indemnify that party for the expense to which it has been put through having unjustly compelled to initiate or defend litigation as the case may be.

See **Nienaber .V. Struckey 1946 AD 1049 at paragraph 1059.**

Indeed the plaintiff was put through unnecessary trouble and expenses and deserves to be awarded costs on attorney and client scale.

ORDER

- a) The exceptant's exceptions are dismissed;
- b) The excipient to pay the costs on attorney and client's scale.



S S MADIBA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

APPEARANCES

Heard on: 14 FEBRUARY 2022

Date of Judgment: 11 NOVEMBER 2022

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