IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 8049/19

In the matter between:

CITY OF CAPE TOWN Plaintiff/Applicant

And

ICT WORKS (PTY) LTD Defendant /Respondent

JUDGMENT DELIVERED ELETRONICALLY DATED 11 AUGUST 2021

KUSEVITSKY, J

[1] The Plaintiff is the Applicant in an application in terms of Rule 30 of the Uniform Rules of Court, to set aside the Defendant's composite Rules 23 and 30

notice and its related exception in terms of Rule 23. I will interchangeably refer to the parties as either Applicant or Plaintiff or Defendant/Respondent as the case may be.

[2] The Plaintiff's complaint is two fold; its complaint relates to the *composite* nature of the notice and secondly that in any event, the subsequent exception does not follow the procedure envisaged, nor the terms of the initial notice.

[3] The Defendant on the other hand contends that a composite notice is appropriate and that it is not necessary for a notice of exception to follow a notice to remove a cause of complaint, *verbatim*.

[4] The parties agreed that only the Rule 30 application should proceed and this is the matter that stands to be adjudicated.

[5] Since counsel for Defendant is located in Johannesburg, the parties requested a virtual hearing of the matter. Unfortunately, due to technical constraints at the High Court, the virtual hearing could not take place and I decided that the matter, which is a simple one, would be adjudicated on the papers.

Background

[6] On 10 May 2020, the Plaintiff issued summons against the Defendant. The Plaintiff's claim arises out of a contract between it and the Defendant pursuant to a tender for the design, supply and installation of the Plaintiff's "*MyCiti*" bus fare system. The Plaintiff alleges that the Defendant breached the contract by failing to properly integrate the system or ensure that adequate fraud detection components were installed, allowing operators to tamper with the system and misappropriate more than R 33 million.

[7] In response to the summons and particulars of claim, the Defendant on 13 June 2019 delivered a "*notice to remove cause of complaint in terms of Rule 23 (1) and Rule 30*" ("*the composite notice*"). The composite notice stated that the Plaintiff's particulars of claim are "*vague and embarrassing or lack averments which are necessary to sustain an action, alternatively, are irregular for lack of particularity*."

[8] Various grounds are set out in the composite notice. The Plaintiff alleges that the Defendant however did not distinguish between the so-called "*vague and embarrassing*" grounds - grounds indicating that the particulars lack averments necessary to sustain a cause of action; and grounds upon which the particulars were allegedly "*irregular for lack of particularity*" within the meaning of Rule 30.

[9] This led the Plaintiff's attorneys to direct an email to the Defendant's attorneys on 1 July 2019 requesting an extension of time so that it could discern the exact nature of the complaints raised. The request for extension was refused by the Defendant in an email dated 3 July 2019. In a subsequent email dated 5 July 2019, the Plaintiff's attorneys wrote to the Defendant's attorneys requesting them to "*advise as to which aspects of your client's notice of 13 June 2019 are raised in terms of Rule 23, and which are raised in terms of Rule 30*." The Defendant's response was that the "*entire notice and, particularly pages 6 to 9, paragraphs 1 to 16 relate to both Rule 23 and to Rule 30*".

[10] The Plaintiff says the above response "*only served to exacerbate the confusion*" as no attempt was made to distinguish between complaints in terms

of Rule 23 and complaints in terms of Rule 30, or to provide any basis for the complaints in terms of Rule 30.

[11] A further email was sent to the Defendant's attorneys advising that the complaints raised could not relate to both Rule 23 and to Rule 30. They maintained that Rules 23 and 30 envisaged entirely different procedures and time limits, and could not be *'entrained simultaneously in relation to the various complaints."* They requested the Defendant to revert as to which procedure related to the various complaints raised.

[12] The Defendant's attorneys responded by email on 9 July 2019 stating that "*both forms of relief can be applied for simultaneously, either together or in the alternative…our client will seek its relief…in accordance with Rule 23 simultaneously with Rule 30*". The email quoted the case of *Persons Listed in Schedule "A" to the Particulars of Claim vs Discovery Health and Others* in support of this contention.[1]

[13] The Plaintiff contends that *Persons Listed in Schedule "A"* is not authority for the "*simultaneous*" procedure adopted by the Defendant. It argues that whilst Murphy J acknowledged that the Defendants in that matter had adopted what they described as a "*two in one*" procedure, the appropriateness of such procedure was not considered by the Court, nor was it endorsed in the *ratio decidendi*. I agree with this contention.

[14] In any event, the Plaintiff contends that the practice in this Division is that a defendant has a choice of remedies: it may either bring an application in terms of

[1] Persons Listed in Schedule "A" to the Particulars of Claim vs Discovery Health [2009] 2 All SA 479 (T).

Rule 30, or raise an exception in terms of Rule 23 (1). The Plaintiff avers that these "*remedies are distinct and require different adjudication*."

[15] The Plaintiff further contends that, even if *Persons Listed in Schedule "A"* is authority that the procedures in Rules 23 and 30 may be initiated in a single notice, it cannot be a basis to lump such complaints together amorphously to be dealt with "*simultaneously.* It argues that if a single notice is used, then a bifurcated procedure would be necessary. The origins and basis of the different complaints would need to be carefully distinguished in the initial notice, and the applicable time limits followed. The Plaintiff avers that the "*distinction is no mere technicality"* as the two rules have different requirements in relation to prejudice.

[16] In responding to the composite notice, the Plaintiff avers that it is unable to ascertain, which alleged complaints arose in terms of Rule 23; which alleged complaints arose in terms of Rule 30; the time limits applicable to each; and the procedure to be followed in each instance.

[17] The Plaintiff also points out that, to the extent that the Defendant seeks to rely on a "*two in one*" procedure, but does not distinguish between the various complaints on the basis that "*the entire notice… Relates to both Rule 23 and to Rule 30*", the Defendant was out of time in terms of Rule 30, and no condonation has been sought by the Defendant in this regard.

[18] Despite the above, the Defendant ignored the Plaintiff's requests to address the confusion and categorise its complaints, and instead simply delivered an exception in terms of Rule 23 (1) on 9 July 2019.

[19] The Plaintiff contends that not only was the Defendant's exception in and of

itself irregular given the irregularity of the composite notice, but it also compounded the confusion by significantly reformulating the exception/complaints prefigured in the composite notice.

[20] Given the above, the Plaintiff on 22 July 2019 delivered a notice in terms of Rule 30 (2) (b) requiring the Defendant to remove various irregularities including:

20.1 To the extent that the Defendant's complaints were raised in terms of Rule 30, they were raised after the expiry of the 10 day time period in terms of Rule 30 (2) (b);

20.2 The Defendant's exception as delivered differed materially from the exception prefigured in the composite notice;

20.3 The Defendant's exception failed to specify which complaints are raised in terms of Rule 30, and which are vague and embarrassing and/or lack averments necessary to sustain a cause of action, and accordingly does not comply with Rules 23 (1) and/or (3) and/or Rules 18 (1) – (4); and

20.4 To the extent that complaints were raised in terms of Rule 30, the procedure adopted in the Defendant's exception does not accord with the procedure set out for such complaints in Rule 30.

[21] It is common cause that no response was delivered to the Plaintiff's Rule 30

notice, and no attempt was made to rectify any of the complaints raised. This application was launched on 15 August 2019. No answering affidavit was delivered in the Rule 30 application, and there is consequently also no reply.

[22] In its Heads of Argument, the Respondent, in reply to the email requesting what aspects of the notice related to Rule 23(1) and which to Rule 30, averred that the entire notice related to Rule 23(1) and to Rule 30.

The Applicable Law

[23] Rule 23(1) permits two distinct grounds of exception, *viz* that the particulars of claim are vague and embarrassing or that they lack averments necessary to sustain an action. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.[2]

[24] If the Defendant wishes to except on the first of these grounds (the vague and embarrassing ground), Rule 23(1)(*a*) requires him, as a precursor to the exception, to afford his opponent an opportunity of removing the cause of complaint within 15 days. The Defendant's notice to this effect must be served within 10 days of receipt of the combined summons. The latter time-limit was introduced by an amendment to Rule 23(1) which came into force on 22 November 2019, and is shorter than the period previously allowed.

[25] If the Plaintiff replies to the notice and the Defendant considers that the reply does not remove the cause of complaint, the defendant must file his exception within 10 days of receipt of the Plaintiff's reply. If there is no reply, the Defendant must file his exception within 15 days from the date on which such reply was due.

[2] Trope v South African Reserve Bank 1993 (3) SA 264 (A) at 269I

[26] Rule 30[3] provides *inter alia* that a party to a cause in which an irregular step has been taken by the other party may apply to Court to set it aside. An application in terms of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged and may be made only if; the Applicant has not himself taken a further step in the cause with knowledge of the irregularity; the Applicant has within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days; and the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of sub-rule (2), i.e. within 20 day of the notice.

[27] The Applicant argues that *Persons Listed in Schedule "A" to the Particulars of Claim vs Discovery Health* is not authority for the proposition that an Applicant who has complaints in terms of Rule 30, as well as in terms of Rule 23, may raise them in a composite notice.

[28] It argues that whilst paragraph 6 of the judgement accepts that a party may proceed by way of a so-called "*two in one*" procedure, the issue as to whether such procedure was appropriate was not raised or argued, nor was such a procedure endorsed by the Court.

[29] In any event, they submit that the correct procedure is that, if a party has complaints on the "*vague and embarrassing*" ground in terms of Rule 23, as well as in terms of Rule 30 (e.g. in relation to the provisions of Rule 18), then the Defendant has a *choice* of remedies: he or she may either bring an application in

[3] Erasmus: Superior Court Practice 2nd ed. pD1-351

terms of Rule 30 to have the pleading set aside as an irregular step, or raise an exception in terms of Rule 23.

[30] A Defendant's notice in terms of Rule 23(1)(*a*) affording the Plaintiff an opportunity to remove an alleged cause of complaint is simply that, a notice. It claims no relief. It does not call for adjudication. If the Plaintiff removes the alleged cause of complaint, the notice has served its purpose and receives no further attention in the case. If the Plaintiff does not remove the alleged cause of complaint but the Defendant decides not to follow up his notice with an exception, the notice likewise receives no further attention. If the Plaintiff fails to remove the alleged cause of complaint and the defendant files an exception, it is the exception, not the preceding notice, that the court adjudicates.[4]

[31] It is common cause that Rule 30 applies only to irregularities of form and not to matters of substance.[5] A party is also not obliged to invoke the rule in order to have proceedings set aside on the ground of irregularity, but may avail himself of any other remedy available to him under the rules.[6] In its heads of argument, the Defendant averred that it was no longer persisting with the Rule 30 procedures and that the present application is an exception in terms of Rule 23(1) only.[7] I will however be referring to both procedures as initially raised in the Rule 30(2)(b) notice.

[4] Tracy Hill N.O and one other v Mark Brown, Case 3069/20 WCHC 3 July 2020 at para 6

[5] Singh v Vorkel 1947 (3) SA 400 (C) at 406

[6] Erasmus, Superior Court Practice D1-352;

[7] It avers the notice refers to Rule 30 in the heading, the body of the notice is appropriate to Rule 23(1)

The appropriateness of the composite notice

[32] The general issue complained of is that the composite notice does not distinguish between the so-called *vague and embarrassing* grounds and grounds upon which the particulars were allegedly irregular for lack of particularity within the meaning of Rule 30.

[33] It is common cause in the practice in this division, that a composite notice is allowed to be filed in terms of Rule 23 and Rule 30. Such a composite notice however has to specifically state which items complained of fall foul under a *vague and embarrassing* complaint, or a complaint that a pleading lacks averments to sustain an action or defence as the case may be. It is trite that the remedies in relation to Rule 23 and Rule 30 are based on separate and distinct complaints requiring different adjudication.[8] The crucial distinction between Rule 28 and Rule 30 are: (a) an exception that a pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded; whereas (b) Rule 30 may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity; it is not necessary that the failure to plead material facts goes to the root of the cause of action.[9]

[34] If a party complains that a pleading is vague and embarrassing, the party complaining must give notice to the other to remove the cause of the complaint. This is so because a complaint that a pleading is vague and embarrassing usually goes to the whole of the cause of action and it must be demonstrated by the excipient to be vague which a party so excepting would be embarrassed to plead to. It is also

[8] Absa Bank Ltd v Boksburg Transitional Local Council 1997 (2) SA 415 (W) at 418E-H

[9] Jowell v Bramwell-Jones And Another 1998 (1) SA 836 (W) at 902F-G

common cause that both rules delineate different time periods within which action to remedy the complaint, should be taken.

[35] It is trite that exception should be dealt with sensibly and not in an overly technical manner.[10] Rule 23(3) specifically provides that wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated. This sub-rule obliges the excipient to state in clear an concise terms the particulars upon which his exception is based and it is not sufficient merely to state that the summons discloses no cause of action or is vague and embarrassing.[11] An excipient is also bound to the grounds of exception set out in his notice of exception and will not be permitted at the hearing of the exception to rely on different grounds or to raise a difference exception.[12]

[36] I therefore cannot agree with the Respondent's contention that an 'entire notice relates to both Rule 23 and Rule 30 for the reasons advanced above. Such a composite notice, or two-in-one procedure must clearly comply with the requisite requirements and time periods applicable to the relevant rules. In any event, since the composite notice is simply a notice, the subsequent exception in terms of Rule 23(1) having been filed, and the complaint relating to Rule 30[13] abandoned, I will now turn my attention to the complaints raised in Plaintiff's Rule 30(2)(b) application.

[10] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 465 H.

[11] Sydney Clow & Co. Ltd v Munnik 1965 (1) SA 626 (A) at 6343G; Erasmus at D1-309

[12] Inkin v Borehole Drillers 1949 (2) SA 366 (A) at 373

[13] In the composite notice

First and Fourth complaints

[37] The first complaint relates to the time periods, with the Defendant's notice in terms of Rule 23 (1) and Rule (30), the composite notice having being delivered on 13 June 2019 and the Defendant's exception delivered on 9 July 2019.

[38] Insofar as the Defendant's complaints were raised in terms of Rule 30, it is clear they were raised after the expiry of the 10-day period in terms of Rule 30(2)(b). There are several cases where our courts have held that an exception is a pleading and as such, a notice of bar is necessary before a Plaintiff can object to an exception on the grounds that it was filed out of time.[14] I am not aware that the Defendant has been placed on bar, accordingly this complaint has no merit. In any event, since the Defendant has abandoned this complaint, this enquiry is academic.

Second and remaining complaints

[39] The second complaint is that the exception differs from the exception prefigured in the composite notice and does not comply with Rules 23 (1) or 23(3) or Rules 18(1) to (4). It is apparent from the grounds raised in the exception, that it is couched or formulated in a way which is different to the formulation described in the composite notice. The complaint therefore is that the framework, structure and formulation differs from the composite notice.

[40] An exception, being a pleading, must be clear and concise and contain sufficient particularity in order to inform a party of the hindrance complained of. Generally, both parties would have an idea about the nature or substance of the complaint. The Plaintiff knows and understands its cause of action. Here, the

[14] Felix and Another v Nortier NO and others 1994 (4) SA 502 (SEC) at 506 E

complaint by the Plaintiff is not so much that it is unaware of the substance of the complaint, but rather by its formulation or the manner in which it is pleaded. I am not of the view that this argument has merit. I deal with some of the complaints raised in relation hereto.

[41] The Plaintiff complains that two grounds of the composite notice are not contained in the exception. I am of the view that the exclusion of two grounds in the exception as raised in the initial composite notice is not prejudicial to the Plaintiff. This however would have been a different case if the contrary had been the case.

[42] The Plaintiff also complains about contractual clauses referred to in the Defendants exception not appearing in the extract attached to the particulars of claim, yet fail to indicate which clauses they are and what paragraphs are being referred to. Paragraph 2.2.7 avers that paragraph 6.1 of the Defendant's exception Is not referred to in the composite notice. Paragraph 6.1 cannot be read in isolation. Paragraph 6 and the sub paragraphs thereof refers to mediation and the allegation that the Plaintiff failed to meet a pre-condition under the contract to institute proceedings. It is apparent that the composite notice refers an allegation that the Plaintiff failed to plead material facts to support a claim which is pre-condition to claiming costs. It is trite that a party is required to plead in a manner that is a clear and concise statement of the material facts of the matter. It is not required that *all* of the facts relied on must be pleaded, but must be done in a manner in which a party is able to know what case to meet. In *McKenzie v Farmers' Co-operative Meat Industries Ltd*[15], the Appellate division held that a cause of action does not comprise

[15] 1922 AD 16 at 23 quoted in Evins v Shield Insurance Co. Ltd 1980 (2) SA 814 (A) at 838 E-F

every piece of evidence which is necessary to prove each fact, but rather every fact which is necessary to be proved.

[43] With regard to paragraphs 2.2.8 and 2.2.9, the Plaintiff complains that the exception raised has not been referred to in the Defendants composite notice alternatively that it is a reformulation of grounds in the composite notice. In my view, as long as the substance of the complaint is apparent, it matters not if the formulation or structure of the complaint has been changed.

[44] Given the above, I am of the view that the Defendant's exception in terms of Rule 23(1) contains sufficient particularity and averments in order for the Plaintiff to remedy the deficiencies as raised therein and does not constitute an irregular step as contemplated.

[45] In the circumstances, the Plaintiff's notice in terms of Rule 30 (2)(b) is dismissed with costs.

ORDER

In the result, the Plaintiff's application in terms of Rule 30(2)(b) is dismissed with costs.

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DS KUSEVITSKY

Judge of the Western Cape High Court, Cape Town

Counsel for Applicant: Advocate Mark Greig

Instructed by: Webber Wentzel

Counsel for Respondent: Advocate Bruce Berman

Instructed by: LNP Attorneys