Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 19524/2018

Before: The Hon. Mr Justice Binns-Ward
Hearing: 18 April 2023
Judgment: 3 May 2023

In the matter between:

INFOVEST CONSULTING (PTY) LTD	First Plaintiff
STATPRO SOUTH AFRICA (PTY) LTD	Second Plaintiff

and

LIBRA PARTNERS LLC	Defendant

JUDGMENT

BINNS-WARD J:

[1] The plaintiffs, which are companies registered in South Africa, instituted proceedings against the defendant, which is a company registered in Massachusetts in the United States of

America, in which an order is sought declaring an agreement purportedly concluded between the first plaintiff and the defendant in or about mid-September 2016 to be invalid and of no force and effect, alternatively, setting the agreement aside. The purported agreement is referred to in the pleading as 'the Agency Agreement'. The defendant pleaded to the claim and delivered a claim in reconvention. Both pleadings have since been amended. The import of the plea is a denial that the Agency Agreement is void or liable to be set aside and the claim in reconvention includes a claim against the first plaintiff for payment of monies alleged to be due in terms to it in terms of the agreement (or an equivalent 'verbal/tacit agreement should the Agency Agreement have been void) and also for damages consequent upon the alleged 'repudiation, alternatively breach' of the whichever of the agreements applied. The defendant also claims an order declaring clause 20 of the Agency Agreement to be of no force or effect.

[2] The first plaintiff has noted exceptions to the iterations of the defendant's aforementioned pleadings dated 25 May 2022 on the grounds that the amended claim in reconvention (misnamed 'counterclaim') 'contains insufficient allegations to establish a claim against the First Plaintiff' and both plaintiffs contend that the defendant's plea contains allegations that are vague and embarrassing. According to the notice of exception, the first and second exceptions described below were noted by the first plaintiff, whereas the third to sixth exceptions described below were noted by both plaintiffs. Mr *Muller* SC, who argued the exceptions, filed heads of argument that purport to be only on behalf of the first plaintiff.

[3] The principles pertinent to the adjudication of exceptions are well-established and were not in any way in issue between counsel when the current matter was argued. Nothing about the matter requires them to be generally rehearsed in this judgment and accordingly, they will be referred to only to the extent necessary or convenient to support the conclusions I have reached on the various points taken by the excipients. Those points will be addressed in

the order in which they were taken in the plaintiffs' notice of exception. I shall refer to them in numerical order as the first to sixth exceptions.

The first exception

[4] The first exception falls to be understood in relation to the matter pleaded in paragraphs 5 – 9 of the defendant's claim in reconvention.

[5] Paragraph 5 of the pleading sets forth what the defendant alleges to have been the material terms of the Agency Agreement. The pleading states that the terms set out '*were*', rather than '*are*', the material terms. On its face, the wording thereby suggests an implication by the pleader that the agreement is no longer extant.

[6] Paragraphs 6 – 9 of the claim in reconvention then proceeds as follows:

> '6. The first plaintiff repudiated the Agency Agreement, alternatively the verbal/tacit agreement in that it failed or refused to:
>
> 6.1 make payment to the defendant of the amount of USD$408,545.45, being the defendant's share of the licence fee that is payable to the defendant in terms of clause 8 of the Agreement; and/or
>
> 6.2 keep the defendant apprised of all developments relating to the developments of Products and Services; and/or
>
> 6.3 provide pre-sale and sales support to the defendant; and/or
>
> 6.4 provide technical skills and information for technical implementation, support and implementation consulting to the defendant; and/or
>
> 6.5 inform the defendant of any technical issues involving or relating to the Products or Services as soon as the first plaintiff became aware of it; and/or
>
> 6.6 ensure that the defendant has access to resource support from the first plaintiff.
>
> 7. The defendant performed its obligations in terms of the Agency Agreement and the verbal/tacit agreement insofar as performance on its part was not made impossible by the first plaintiff.
>
> **8. <u>ACCRUED RIGHTS:</u>**
>
> 8.1 Pursuant to the conclusion of the Agency Agreement, alternatively the verbal/tacit agreement, and the defendant's performance of its obligations in

terms thereof, contracts were concluded between and for the benefit of the first plaintiff and the following entities:

8.1.1 Triasima;

8.1.2 Atlantic Fund Services; and

8.1.3 FDP.

8.2 The first plaintiff, alternatively an entity nominated by the first plaintiff, received payment of licence fees from Triasima, Atlantic Fund Services and FDP pursuant to the defendant's performance and the aforementioned contracts concluded between such entities and the first plaintiff.

8.3 The conclusion of the contracts referred to in paragraph 8.1 above entitled the defendant to the payment of a share of the licence fees.

8.4 The defendant's share of the licence fees, calculated in terms of clause 8.1.1 of the Agency Agreement, alternatively the verbal/tacit agreement, is as follows and it became due, owing and payable on the dates pleaded below:

8.4.1. 10 September 2018:	Triasima:	US$ 55 576.85
8.4.2. 30 November 2018:	AFS*:	US$ 10 500.00
8.4.3. 14 January 2019:	FDP:	US$ 19797.42
8.4.4. 1 May 2019:	AFS:	US$ 10 500.00
8.4.5. 10 September 2019:	Triasima:	US$ 55 667.15
8.4.6. 29 November 2019:	AFS:	US$ 10 500.00
8.4.7. 14 January 2020:	FDP:	US$ 20 998.65
8.4.8. 29 April 2020:	AFS:	US$ 10 500.00
8.4.9. 10 September 2020:	Triasima:	US$ 55 445.60
8.4.10. 31 December 2020:	AFS:	US$ 10 500.00
8.4.11. 15 January 2021:	FDP	US$ 27 837.28
8.4.12. 29 April 2021:	AFS	US$ 10 500.00
8.4.13. 15 September 2021:	Triasima	US$ 59,481.35
8.4.14. 30 November 2021:	AFS	US$ 10,500.00
8.4.15. 28 February 2022:	FDP	US$ 29,751.15
8.4.16. 3 May 2022:	AFS	US$ 10,500.00
Total:		**US$ 408,545.45**

(* I have used the acronym AFS in the table above in place of the pleading's reference to 'Atlantic Fund Services'.)

8.5 In the premises, the plaintiff is liable to the defendant for payment of licence fees in the amount of US$ 408,545.45 which amount the first plaintiff has failed to

pay to the defendant.

9. <u>DAMAGES:</u>

9.1 As a result of the first plaintiff's repudiation, alternatively breach of the Agency Agreement (25 October 2018), alternatively the verbal/tacit agreement, the defendant suffered damages in the amount of US$ 17,749,454.60 which amount is calculated as follows:

9.1.1. the first plaintiff would have received cumulative licence fees in the amount of US$ 51,541,880.00 from sales generated by the defendant during 2018 to 2028;

9.1.2. the defendant would, in terms of clause 8.1 of the Agency Agreement, alternatively the verbal/tacit agreement, have become entitled to 35% of such licence fees had it not been for the first plaintiff's repudiation, alternatively breach of the Agency Agreement, alternatively the verbal/tacit agreement; and

9.1.3. the defendant's share, i.e., 35%, of such licence fees paid to the first plaintiff or an entity nominated by the first plaintiff, less the accrued license fees set out in paragraph "8.4." above is US$ 17,749,454.60 ((US$51,541,880.00x35%)-US$408,545.45).

9.2 The damages pleaded herein above flow naturally from the breach of the agreements of the kind forming the subject matters of the counter-claim, alternatively were damages that were within the contemplation of the parties when the agreements were concluded and the agreements were concluded on the basis of such knowledge.'

[7] The firsts plaintiff's first ground of exception is set out in the following terms at paragraphs 6 – 8 of the notice of exception:

'6. The amended counterclaim contains no allegations as to the manner in which the First Plaintiff "*breached*" the agreement.

7. In addition, an allegation, without more, that the First Plaintiff "repudiated" and/or "breached" the agreement does not in law give rise to a claim for damages calculated on the basis that the Defendant would have become entitled to 35% of licence fees of US$51 541 880 from sales which would have been generated by the First Plaintiff in the future, in the period May 2022 to 2028.

8. Accordingly, the amended counterclaim lacks averments necessary to sustain the Defendant's claim for payment of the sum of US$17 749 454,60, plus interest thereon.'

The first plaintiff contends that for those reasons the pleading fails to make out a cause of action.

[8] The claim in reconvention has been carelessly drafted in certain respects but, as amply illustrated in the jurisprudence on exceptions, the court and the recipient parties are required to read the pleadings in a businesslike manner. A slipshod pleading will withstand scrutiny on exception so long as the facts pleaded make out a cause of action or cognisable defence and the case or defence, as the case might be, has been stated with sufficient clarity to inform the other party of the case it has to meet or plead to.

[9] In my judgment it is clear enough, when the pleading is read as a whole, and in the pragmatic manner that is indicated, that the respects in which the defendant alleges the first plaintiff to have been in breach of the Agency Agreement or its equivalent oral or tacit agreement are set out in subparagraphs 6.1 to 6.6 of the claim in reconvention. I am not persuaded that the defendant's employment of the verb 'repudiated' in the introduction to paragraph 6 stands in the way of such conclusion, as the plaintiffs' counsel sought to argue. On the contrary, the content of paragraph 6, read as a whole, is inconsistent with the import of repudiation and consistent, rather, with the concept of breach by way of non-performance.

[10] It is well established that 'repudiation', whilst it is often characterised as a species of 'breach', is manifested in the indication by a contracting party of its intention not to perform or accept performance of the contract. That is a matter of intention; although the existence of an intention to repudiate is determined objectively, that is as outwardly manifested seen through the eyes of the innocent party; it is not dependent on the repudiating party's subjective state of mind. The other well recognised forms of breach of contract are succinctly described in GB Bradfield, *Christie's Law of Contract in South Africa* 8th ed. (LexisNexis) at p.619:

> 'The obligations imposed by a contract's terms are meant to be performed, and if they are not performed at all, or performed late, or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the contract or, in the first two cases, to be in *mora*, and, in the last case, to be guilty of positive malperformance.'

The instances of non-performance listed in paragraph 6 of the claim in reconvention are on their face all examples of the first plaintiff being in *mora*.

[11] To the extent that the position is rendered confusing by the defendant's use, in conjunction with each other, of the terms 'repudiate' and 'refused', which is language more suggestive of 'repudiation' than it is of 'breach' in the sense described in the passage from *Christie*, the plaintiffs might have been entitled to complain that the pleading was vague and embarrassing. They did not. The first plaintiff's counsel made it clear, however, that its first ground of exception was directed only at the inadequate pleading of a case based on *breach* of contract and was not related in any way to the issue of *repudiation*.

[12] There is more substance in the complaint articulated in paragraphs 7 and 8 of the notice of exception.

[13] It is plain, when the claim in reconvention is read as a whole, that the sum claimed by the defendant is comprised of two components, *viz*. (i) US$408,545.45 in respect of its so-called 'accrued rights' in terms of the contract and (ii) the balance in respect of the share of licence fees that the defendant 'would have received' or 'would have become entitled to' in terms of the contract during the period May 2022 to 2028 'had it not been for the first plaintiff's repudiation, alternatively breach of the Agency Agreement, alternatively the verbal/tacit agreement'.

[14] The first mentioned component is pleaded in paragraph 8 of the claim in reconvention. The first ground of exception is not directed at the first component, advisedly so. It is clear, if paragraphs 6.1 and 8 of the claim in reconvention are read contextually, that

the sum of US$408,545.45 is an amount that the defendant alleges that it had already become entitled to in terms of clause 8 of the Agency Agreement or the equivalent provision in the alternative contract. The breach concerned is the first plaintiff's failure or refusal to pay the amount. It is cognisably a claim for specific performance, which no doubt explains the pleader's distinction of the amount for the purposes of pleading from the balance, which is claimed as 'damages'. It might be clumsily pleaded, but there is no doubting that a cause of action has been made out in respect of the first component.

[15] The position is different in respect of the second component (which is the subject matter of the relief claimed in terms of prayers 4 and 5 of the claim in reconvention). The correctness of the assertion in paragraph 7 of the notice of exception that 'an allegation, without more, that the First Plaintiff "repudiated" and/or "breached" the agreement does not in law give rise to a claim for damages calculated on the basis that the Defendant would have become entitled to 35% of licence fees of US$51 541 880 from sales which would have been generated by the First Plaintiff in the future, in the period May 2022 to 2028' cannot be gainsaid.

[16] A repudiation puts the innocent contracting party to an election. The innocent party can elect to enforce the contract and claim specific performance, or it can choose to accept the repudiation and terminate the contract. That much is trite.

[17] An election to enforce the contract would allow the innocent party to claim whatever payment was then due in terms of the contract plus the damages, if any, sustained as a result of the guilty party's delayed performance. Where the breach consists of a failure to make payment, the damages in question are ordinarily awarded by way of an order for interest *ex tempore morae*.[1] If the contract does not specify the due date for payment, the innocent party would have to place the defaulting debtor in *mora* by making a demand for payment. The

1 'From the time of the delay'. '*Mora*' is the Latin word for 'delay'.

position in respect of a claim for contractual damages of an innocent party who has elected not to accept a repudiation is indistinguishable from that of a party who claims damages for 'breach' of contract in any of the senses described in the passage in *Christie* quoted in paragraph [9] above. There is no allegation in the claim in reconvention that the defendant placed the first plaintiff in *mora*.

[18] Absent some very unusual provision in the contract, enforcement of the contract would not, entitle the innocent party to claim upfront an amount that it might anticipate becoming entitled to in the future during the remaining term of an executory contract. Yet, on one reading of the passage in the defendant's claim in reconvention quoted above, that is what the defendant appears to be seeking to do. If there is a basis for such a claim (very out of the ordinary as it would be) in the current matter, the defendant has failed to plead it. I was unable to find any in the terms of the Agency Agreement (an incomplete copy of which was annexed to the plaintiffs' declaration), and none was pointed out to the court during argument.

[19] An election by the innocent party to accept the repudiation and terminate the contract would put it in a position to be able to claim damages. Ordinarily, the innocent party's damages would be in the sum necessary to place it in the position financially in which it would have been had there been proper performance of the contract. In the case of an executory contract, the computation of its damages would take into account payments that the innocent party would have received in the remaining term of the contract had it not been cancelled. The use of the subjunctive tense in paragraph 9.1 of the claim in reconvention suggests that this is the type of scenario that the pleader had in mind. There is, however, no allegation in the pleading that the defendant accepted a repudiation by the first plaintiff, assuming such had been adequately pleaded. As noted earlier, the language of paragraph 6 of the claim in reconvention is in any event more consistent with a reliance on breach than on

repudiation. On the other hand, if it was the pleader's intention to found the claim in prayers 4 and 5 on a cancellation of the contract pursuant to the first plaintiff's failure to perform (ie 'breach') after having been placed in *mora*, the necessary allegations to support that are also lacking.

[20] Accordingly, whether predicated on a breach or a repudiation of the agreement, the pleaded facts do not make out a cause of action in respect of the defendant's counterclaim for damages in the sum of US$ 17,749,454.60.[2] The first plaintiff's first ground of exception will therefore be upheld to that extent.

The second exception

[21] The second exception concerns the defendant's claim, in terms of prayer 3 of the claim in reconvention, for an order that 'clause 20 of the Agency Agreement is contrary to public policy and/or is (*sic*) unenforceable against the defendant'. Clause 20 of the Agency Agreement provides, s.v. '**NO CONSEQUENTIAL LOSSES**' –

> 'Under no circumstances whatsoever shall any Party be liable for any indirect, extrinsic, special, penal, punitive, exemplary or consequential loss or damage of any kind whatsoever or howsoever caused (whether arising under contract, delict or otherwise and whether the loss or damage was actually foreseen or reasonably foreseeable), including but not limited to any loss of commercial opportunities or loss of profits, and whether as a result of negligent (including grossly negligent) acts or omissions of such Party or its servants, agents or contractors or other persons for whose actions such Party may otherwise be liable in law.'

[22] The allegations pleaded in support of the claim are contained in paragraph 10 of the claim in reconvention, which reads as follows:

> '10. The enforcement of clause 20 of the Agency Agreement would be unfair, unreasonable and unjust to the extent that it would be contrary to public policy by reason of the following:

[2] The arithmetical calculation in para 91.3 of the claim in reconvention appears in any event to be incorrect, but nothing turns on that for current purposes.

10.1. no equality in contract existed when the Agency Agreement was concluded;

10.2. when the Agency Agreement was concluded between the first plaintiff and the defendant, it was not contemplated by those parties that the first plaintiff's business would be transferred to another entity in the StatPro Group of companies;

10.3. the plaintiffs, in collaboration with other entities in the StatPro Group of companies, transferred the first plaintiff's business to other entities after the defendant had indicated that it intended enforcing its rights in terms of the Agency Agreement; and

10.4. the directors of the plaintiffs acted in a mala fides manner in dealing with the first plaintiff's business, the aim of which actions was to render the defendant unable to enforce its rights in terms of the contract and/or unable to claim damages.'

[23] The first plaintiff stated in paragraph 11 of the notice of exception that 'the Defendant is precluded by clause 20 of the Agency Agreement from recovering the amounts claimed in claims 4 and 5'. ('Claims 4 and 5' is a reference to the equivalently numbered prayers in the claim in reconvention, in terms of which the defendant seeks orders against the plaintiffs for contractual damages in the sum of US$ 17,749,454.60 and interest thereon *a tempore morae*.) The defendant, however, makes no such allegation in its pleading. Indeed, it is not apparent on the pleading why the defendant is seeking a declaratory order.

[24] It is by no means clear to me that the first plaintiff's statement is well-founded – certainly to the extent that it implies a construction of the clause that would exclude a contractual claim for what is variously labelled as 'direct' (as distinct from 'indirect'), 'intrinsic' (as distinct from 'extrinsic') or 'general' (as distinct from 'special') contractual damages – but the point, in any event, is one that might appositely be taken in a plea rather than an exception. Clause 19 of the Agency Agreement appears to be directed at excluding claims by either party for special contractual damages, whereas clause 20 is directed at the waiver by the parties of any claims against each other for 'consequential loss'. What the

distinction is between the potential claims covered by clause 19 and those at which clause 20 appears to be directed might be the subject of some debate. It is evident, however, that both clauses manifest what might be labelled as *pacta de non petendo* (agreements not to sue). The question raised by the exception is whether the pleading makes out a cause of action for an order declaring the *pactum de non petendo* in clause 20 to be contrary to public policy.

[25] The meat of the second exception is contained in paragraphs 13 and 14.1 of the notice of exception, which go as follows:

> '13 The allegations in paragraphs 10.1 to 10.4 [of the claim in reconvention] do not, individually or cumulatively, sustain the allegation that enforcement of clause 20 of the Agency Agreement would be unfair, unreasonable and unjust to the extent that it would be contrary to public policy, in that:
>
> 13.1 The allegation in paragraph 10.1 ("no equality in contract") does not constitute a basis not to enforce clause 20; and, in any event, ex facie the terms of the Agency Agreement, the allegation is manifestly false and divorced from reality.
>
> 13.2 The allegation in paragraph 10.2 ("*transfer of the First Plaintiff's business to another entity*") is irrelevant and furnishes no basis for the non-enforcement of clause 20 on the grounds of public policy.
>
> 13.3 The allegation in paragraph 10.3 ("*transfer of the First Plaintiff's business after the Defendant had indicated that it intended enforcing its rights*") is irrelevant and furnishes no basis for the non-enforcement of clause 20 on the grounds of public policy.
>
> 13.4 The allegation in paragraph 10.4 ("*the directors of the Plaintiffs acted in a mala fide manner for the purpose alleged*") is irrelevant and furnishes no basis for the non-enforcement of clause 20 on the grounds of public policy.
>
> 14 Accordingly:
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> 14.1 the allegations in paragraph 10 of the amended counterclaim are insufficient to sustain claim 3; ...'

[26] The principles that the courts will apply in determining whether a contract or contractual provision should not be enforceable for being contrary to public policy have quite recently been reviewed by the Constitutional Court *in Beadica 231 CC and Others v Trustees*

for the time being of the Oregon Trust and Others [2020] ZACC 13 (17 June 2020); 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC). The Court there affirmed its earlier judgment in *Barkhuizen v Napier* [2007] ZACC 5 (4 April 2007); 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

[27] In *Beadica*, the Constitutional Court accepted the summary of 'the relationship between private contracts and their control by the courts through the instrument of public policy, underpinned by the Constitution' given in the appeal court's judgment in *A B and Another v Pridwin Preparatory School and Others* [2018] ZASCA 150 (1 November 2018); [2019] 1 All SA 1 (SCA); 2019 (1) SA 327 (SCA); 2019 (8) BCLR 1006 (SCA), at para 27,[3] viz –

> (i) Public policy demands that contracts freely and consciously entered into must be honoured ['*pacta sunt servanda*'];
>
> (ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;
>
> (iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
>
> (iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;
>
> (v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;

[3] Drawing on the authorities cited in footnotes 7 – 12, *Barkhuizen* supra, *Bredenkamp & others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA), *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA (A) and *Potgieter & another v Potgieter NO & others* 2012 (1) SA 637 (SCA).

(vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.

[28] In para 83-90 of *Beadica*, the Constitutional Court 'further elucidated' two of the points listed in *Pridwin*.

[29] In para 87, the majority judgment explained, with reference to the first point on the list in *Pridwin*, that: '... *pacta sunt servanda is not the only, nor the most important principle informing the judicial control of contracts. The requirements of public policy are informed by a wide range of constitutional values. There is no basis for privileging pacta sunt servanda over other constitutional rights and values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances*'. The explanation was supplemented with a footnote comment (in fn. 200) that '*This is not to say that a constitutional right must be implicated for a contractual term to be contrary to public policy.*'

[30] With reference to the fifth point listed in *Pridwin*, the majority judgment in *Beadica* cautioned that the principle should not serve as a means for courts to shirk their constitutional duty. At para 90, the majority held '... *courts should not rely upon this principle of restraint to shrink from their constitutional duty to infuse public policy with constitutional values. Nor may it be used to shear public policy of the complexity of the value system created by the Constitution. Courts should not be so recalcitrant in their application of public policy considerations that they fail to give proper weight to the overarching mandate of the Constitution. The degree of restraint to be exercised must be balanced against the backdrop*

of our constitutional rights and values. Accordingly, the "perceptive restraint" principle should not be blithely invoked as a protective shield for contracts that undermine the very goals that our Constitution is designed to achieve. Moreover, the notion that there must be substantial and incontestable "harm to the public" before a court may decline to enforce a contract on public policy grounds is alien to our law of contract'. (The import of the last sentence was illustrated with reference to para 158 of the minority judgment of Froneman J where reference was made to the Appellate Division jurisprudence regarding public policy in restraint of trade matters,[4] as well as to *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA (A), which, it will be recalled, involved findings that the unduly oppressive effect of a contract on an individual's private rights rendered its enforcement contrary to public policy.)

[31] A two-stage enquiry was described in *Barkhuizen*. Its character was described in *Beadica* at para 37 in the following way: '*The first stage involves a consideration of the clause itself. The question is whether the clause is so unreasonable, on its face, as to be contrary to public policy. If the answer is in the affirmative, the court will strike down the clause. If, on the other hand, the clause is found to be reasonable, then the second stage of the enquiry will be embarked upon. The second stage involves an inquiry whether, in all the circumstances of the particular case, it would be contrary to public policy to enforce the clause. The onus is on the party seeking to avoid the enforcement of the clause to "demonstrate why its enforcement would be unfair and unreasonable in the given circumstances." The majority emphasised that particular regard must be had to the reason for non-compliance with the clause*'. (Footnotes omitted.)

[32] It has not been pleaded, nor in my view could it have plausibly been argued, that the clause is so unreasonable, on its face, as to be contrary to public policy. That moves the focus onto whether the pleading sets out circumstances which, if established, could impel the

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[4] *Magna Alloys & Research (SA) (Pty) Ltd. v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (A).

conclusion that it would be contrary to public policy to enforce the clause. The only circumstances pleaded in the claim in reconvention are those set out in paragraph 10.1 to 10.4 thereof, quoted above.[5]

[33] The first plaintiff's counsel submitted that 'there is no general principle to the effect that the contract or, as in this particular case, a particular clause in the contract, will not be enforced because "no equality in contract existed" when the contract was concluded'. That must be right, for otherwise it would not be open to anyone to make an agreement with another party with greater or lesser bargaining power. What about employment contracts or mortgage loan agreements with banks, for example? Could it be said that they should be unenforceable merely because of the inequality of the contracting parties? Obviously not. Demonstrating in a given case that such contracts should not be enforced as being contrary to public policy would require something more. It would require proof that the operation of the given contract according to its tenor would be legally or societally unacceptable for some objectively identifiable reason; for example, that it would unjustifiably impinge on an inalienable constitutional right, be inconsistent with the rule of law (the old case of *Nino Bonino v De Lange* 1906 TS 120 affords an example) or bear unacceptably onerously on a party (as illustrated, for example, in *Sasfin* supra, where the features of a cession *in securitatem debiti* executed in favour of Sasfin by its debtor (Beukes) that impelled the conclusion that the agreement offended against public policy were described by the court as follows: '*This follows from the provisions in clause 3.4 that Sasfin would be "entitled but not obliged" to refund any amount to Beukes in excess of Beukes' actual indebtedness to Sasfin. As a result Beukes could effectively be deprived of his income and means of support for himself and his family. He would, to that extent, virtually be relegated to the position of a slave, working for the benefit of Sasfin (or, for that matter, any of the other creditors). What*

[5] In paragraph [21].

is more, this situation could, in terms of clause 3.14, have continued indefinitely at the pleasure of Sasfin (or the other creditors). Beukes was powerless to bring it to an end, as clause 3.14 specifically provides that "this cession shall be and continue to be of full force and effect until terminated by all the creditors". Neither an absence of indebtedness, nor reasonable notice to terminate by Beukes in those circumstances would, according to the wording of clause 3.14, have sufficed to bring the deed of cession to an end.').

[34] The defendant sought to supply that 'something more' in subparagraphs 10.2 to 10.4 of its claim in reconvention. The allegations pleaded there imply conduct by the first plaintiff directed at thwarting the enforcement of the Agency Agreement by the defendant. They have no recognisable relationship with or connection with clause 20, which, as mentioned, contains a mutual waiver by the parties of any right to claim for 'consequential loss' from each other. It has not been suggested that clause 20 excludes the defendant's right to sue to enforce the agreement. (And, although it is not a question for decision at this stage, as indicated above it in any event seems to me that the clause does not exclude the right of an innocent party to the contract to claim general, direct or intrinsic contractual damages from a defaulting party.)

[35] In his written submissions, counsel for the defendant stressed that it was incumbent on a court seized of determining whether a contract was contrary to public policy to have regard to '*all the particular facts and circumstances of* [the] *case*' and proceeded –

> 'The particular facts and circumstances relevant to clause 20 of the written agency agreement should be considered by the trial court when deciding whether the clause should be enforced. A decision by a court deciding an exception whether it would or would not be contrary to public policy to enforce clause 20, without hearing the evidence, would be premature. It should be borne in mind that the pleading only contains the *facta probanda* while the trial court will have the benefit of the *facta probantia*.'

[36] The argument misses the point. In the context of the absence of a contention that the clause is contrary to public policy on its face, this court is not seized of the task of deciding whether it is. The question before this court is whether the pleaded facts make out a triable case in support a claim for a declaration that it is.

[37] For the reasons stated in paragraphs [33] and [34] above, and accepting that the facts pleaded in paragraph 10 of the claim in reconvention are what the defendant asserts to be the *facta probanda*, the pleading does not make out a cognisable case for the relief claimed in prayer 3 thereof. The argument that some or other, as yet unidentified, evidence might come out in the wash at the trial to support the claim cannot prevail.[6] The pleadings are required to define the parameters of the case being sent to trial. They are as much for the court as the litigants. If the parameters of the case are not sufficiently apparent on the pleadings, how is the trial judge to manage the proceedings effectively, and how are the opposing parties to know the case they must come to trial ready to meet?

[38] The second exception will therefore be upheld.

[39] It is strictly unnecessary, in view of the conclusions reached on the first and second exceptions, to deal with the other grounds of exception (the third and fourth exceptions, respectively) raised by the plaintiffs on the basis that certain allegations in the claim in reconvention are vague and embarrassing. I shall do so, however, so that the court's findings in that regard might assist if the defendant avails of the opportunity that will be afforded to it, pursuant to the conclusions already reached, to amend the pleading.

The third exception

[40] In paragraph 7 of its claim in reconvention, the defendant pleaded –

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[6] Cf. *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73 (9 September 2005); [2006] 1 All SA 6 (SCA); 2006 (1) SA 461 (SCA), at para 3.

> 'The defendant performed its obligations in terms of the Agency Agreement and the verbal/tacit agreement insofar as performance on its part was not made impossible by the first plaintiff.'

[41] The first plaintiff contends in its notice of exception that the allegation in paragraph 7 of the claim in reconvention is vague and that it is embarrassed in pleading thereto because the defendant had not pleaded –

> '1. What is meant by the allegation that the Defendant performed its obligations "insofar as performance on its part was not made impossible by the First Plaintiff"; and/or
> 2. When, where and in what manner performance on its part was made impossible by the First Plaintiff.'

[42] In my judgment, it is evident, when the pleading is read as a whole, that the purpose of paragraph 7 of the claim in reconvention was merely to plead that the defendant had complied with its obligations under the contract(s). It was necessary for it to do that to be able enforce its alleged rights under the contract. It was not necessary for the defendant to plead that it had not performed what was impossible for it to have performed under the contract, for obviously it could have been under no obligation to have done so. There is nothing in the pleaded case that would confuse or embarrass the plaintiffs from denying, if that is what they contend to be the position, that the defendant had performed its obligations under the contract(s).

[43] I have not been persuaded that the pleading of paragraph 7 leaves the plaintiffs uncertain of the case they are called upon to meet or in material uncertainty as to how to plead to it.

[44] The third exception will therefore be dismissed.

The fourth exception

[45] The fourth exception is about the impenetrable reference, in parentheses, in paragraph 9.1 of the claim in reconvention (quoted in paragraph [6] above) to the date 25 October 2018. There is no doubting that the significance of the date is not apparent on the pleading. In my judgment, the plaintiffs cannot reasonably be expected to plead to paragraph 9.1 without clarification of the import of the reference to the date mentioned there. The first plaintiff's contention that the pleading is vague and embarrassing in the respect is well-founded. The fourth exception will be upheld, accordingly.

[46] The remaining exceptions, also on the grounds of vagueness and embarrassment, concern the defendant's plea to the claim in convention.

The fifth exception

[47] In paragraphs 5 – 7 of their declaration, the plaintiffs alleged the 'purported' conclusion of the Agency Agreement on the first plaintiff's behalf by one Kemper. Further on in the pleading it is alleged that Kemper acted fraudulently and without authority.

[48] In subparagraphs 2.4 and 2.5 of its plea, under the subheadings 'Ostensible Authority' and 'Estoppel', respectively, the defendant responded as follows to the plaintiffs' allegation that Kemper had not been authorised to act on the first plaintiff's behalf in concluding the agreement:

> '**OSTENSIBLE AUTHORITY:**
>
> 2.4. In the alternative to sub-paragraphs 2.2 and 2.3 above, and should it be found that Kemper did not have actual authority to conclude binding agreements, including the Agency Agreement, on the first plaintiff's behalf (which is denied), the defendant pleads as follows:
>
> 2.4.1. at all relevant times hereto and in particular on 9 November 2015, 9 May 2016 and 15 September 2016, the first plaintiff, duly represented by Kemper and one or more of the other directors of the first plaintiff, conducted itself in a manner that misled the defendant's representatives into reasonably believing that Kemper had actual authority to conclude binding agreements,

including the Agency Agreement, on the first plaintiff's behalf with the defendant (hereinafter 'the misrepresentation');

2.4.2. the misrepresentation led to an appearance that Kemper had the necessary actual authority to conclude binding agreements, including the Agency Agreement, on behalf of the first plaintiff with the defendant;

2.4.3. the defendant reasonably acted upon the ostensible or apparent authority of Kemper and, on that basis, concluded the Agency Agreement with the first plaintiff; and

2.4.4. in the premises, the first plaintiff is bound by the conduct of Kemper and its other directors referred to in paragraph 2.4.1 above and by the terms of the Agency Agreement concluded between the first plaintiff and the defendant.

ESTOPPEL:

2.5. As an alternative to sub-paragraphs 2.2 to 2.4 above, and should it be found that Kemper did not have actual or ostensible authority to bind the first plaintiff and to conclude the Agency Agreement on its behalf (which is denied), the defendant pleads as follows:

2.5.1. at all relevant times hereto but in particular from 9 November 2015 to 15 September 2016, the first plaintiff, duly represented by Kemper and other directors of the first plaintiff, by way of their conduct, both express and by way of silence or inaction, represented to the defendant's representatives that Kemper had the necessary authority to conclude binding agreements on the first plaintiff's behalf, including the Agency Agreement forming the subject matter of this case;

2.5.2. the representations were made by the first plaintiff, represented as pleaded in paragraph 2.5.1 above, to the defendant's duly authorised representatives and directors;

2.5.3. the first plaintiff, duly represented as pleaded in paragraph 2.5.1 above, did expect, alternatively must reasonably have expected, that its conduct may mislead the defendant to reasonably believe that Kemper had the necessary authority to conclude binding agreements on the first plaintiff's behalf, including the Agency Agreement;

2.5.4. the defendant reasonably acted upon the truth of the representation;

2.5.5. the defendant acted to its prejudice by concluding the Agency Agreement, by performing its obligations in terms thereof and by being the effective cause of agreements concluded by and/or for the benefit of the first plaintiff with third parties on the basis of which agreements the defendant earned and would have continued to earn fees; and

2.5.6. in the premises, the first plaintiff is estopped from relying on a lack of authority on the part of Kemper to conclude the Agency Agreement and bind the first plaintiff thereto.'

[49] The fifth ground of exception raised by the plaintiffs is that the plea is vague and embarrassing because it 'does not identify the "*other directors of the First Plaintiff*" to which reference is made in subparagraphs 2.4.1, 2.5.1 and 2.5.2.

[50] In my judgment, the omission is not one that prejudices the plaintiffs' ability, if so advised, to replicate to the plea, nor does it leave the plaintiffs in any doubt about the issues for trial. The plaintiffs will be able to obtain the missing particularity in due course through a request for trial particulars.

[51] In the result, the fifth exception will be dismissed.

The sixth exception

[52] The first plaintiff's sixth exception was stated in the following terms in paragraphs 25 – 30 of their notice of exception:

'25 In response to the Plaintiffs' allegation in paragraph 9.1 of the particulars of claim (to the effect that Stillwell, Kemper and Burke fraudulently backdated the signature date of the agreement to reflect a signature date of 9 May 2016, when in fact it was signed on or about 14 and 16 September 2016), in paragraph 5.1 of the amended plea the Defendant admits that the agreement was back-dated to reflect 9 May 2016 as the signature date.

26 In paragraph 7 of the amended plea the Defendant pleads that the backdating of the agreement to 9 May 2016 occurred "pursuant to and against the backdrop of the following facts:", being the allegations contained in paragraphs 7.1 to 7.10.

27 In paragraph 7.3 of the amended plea the Defendant pleads reference to a period up to and including October 2018.

28 In paragraph 7.10 the Defendant pleads reference to an event which allegedly occurred in November 2016.

29 On the face of it, events which post-date September 2016 do not and cannot have any relevance to the backdating of an agreement to 9 May 2016 of an agreement concluded in September 2016.

30 Accordingly, these allegations are vague and the Plaintiffs are embarrassed in pleading thereto.'

[53] Paragraph 7 of the defendant's plea reads as follows:

'7. The conclusion of the Agency Agreement and the insertion at the instance of the first plaintiff's duly authorised representative, Mr Kemper, of the date of 9 May 2016 as the signature date occurred pursuant to and against the backdrop of the following facts:

7.1. the first plaintiff and its products were not known in the United States of America or Canada prior to October 2015;

7.2. the first applicant had no agent or representative in the USA or Canada prior to October 2015;

7.3. during the period October 2015 to October 2018 the first plaintiff allowed the defendant to represent itself as 'Infovest USA', to sell the first plaintiff's products in the USA and Canada and approved such representation and sales by the defendant;

7.4. after discussions beginning in October 2015, during November 2015 the commercial collaboration between the first plaintiff and the defendant and the defendant acting as the first plaintiff's agent in the USA and Canada, had developed and solidified sufficiently for the terms of such collaboration and agency to be included in a document drawn up by the first plaintiff's representatives and termed 'Heads of Agreement', a copy of which is attached hereto and marked "A". The Heads of Agreement will be referred to hereinafter as 'the HOA';

7.5. during the period 1 March 2016 to 7 March 2016 the plaintiffs' duly authorised representatives, Messrs Wheatley, Peddar and Kemper in particular, together with the defendant's Mr Stillwell, developed certain rules (hereinafter the "Rules of Engagement') to regulate the commercial collaboration between the first plaintiff and the defendant and to regulate the sale of the first plaintiff's products in the USA and Canada by the defendant, acting as agent of the first plaintiff. This included the understanding that any opportunities uncovered by sales people of the second plaintiff and related companies (e.g. StatPro Inc. and Statpro Canada Inc) for the first plaintiff's

products in USA and Canada would be passed exclusively to the defendant. A copy of the Rules of Engagement, accepted and approved by the first and second plaintiffs and the defendant, is attached hereto and marked "B";

7.6. the first and second plaintiffs and the defendant all considered themselves bound by the HOA (from November 2015 to 15 September 2016) and the Rules of Engagement (from March 2016 to 15 September 2016) and acted in a manner consistent with them being bound by the terms thereof;

7.7. the first and second plaintiffs and the defendant all gave effect to the HOA (from November 2015 to 15 September 2016) and the Rules of Engagement (from March 2016 to 15 September 2016);

7.8. from November 2015 to 15 September 2016 the defendant acted as the first plaintiff's sole agent in the USA and Canada;

7.9. from November 2015 to 15 September 2016 the defendant promoted, marketed and sold the first plaintiff's products in the USA and Canada and rendered services to the purchasers of the first plaintiff's products on behalf of the first plaintiff; and

7.10. in November 2016 the first plaintiff paid fees to the defendant in accordance with the HOA and the Rules of Engagement, fees arising from the sale of the first plaintiff's products to Triasima Portfolio Management Inc (hereinafter 'Triasima'), this being the defendant's first client that they signed on.'

[54] There is no merit in the first plaintiff's complaint. The course of conduct pleaded in subparagraph 7.3 of the plea was a continuing course of conduct that commenced before the execution of the Agency Agreement and continued after it. There is nothing vague or embarrassing about the allegation. It is the continuing course of conduct that formed part of the alleged 'backdrop' to the execution of the agreement. That it continued for a period after the execution of the agreement is neither here nor there. Similarly, the payment of fees in November 2016 alleged in subparagraph 7.10 is conduct by the first plaintiff related to the HOA alleged concluded in November 2015, well before the execution of the Agency Agreement in September 2016. The relevant 'backdrop' is not only the conclusion of the HOA but also the parties' performance in terms of the HOA. It is immaterial in the context

of the pleaded facts that the alleged performance post-dated the execution of the Agency Agreement.

[55] The sixth exception will therefore be dismissed.

Costs

[56] The overall result of the exception proceedings is a mixed bag. The first plaintiff has been substantially successful with regard to its exceptions to the defendant's claim in reconvention, but unsuccessful in respect of its exceptions to the defendant's plea. The focus of argument at the hearing and in the heads of argument was, understandably, on the questions whether the defendant had made out causes of action in respect of the relief claimed in prayers 3, 4 and 5 of the claim in reconvention, matters in respect of which the plaintiffs have proven to be successful. In all the circumstances I consider that it would be just to order that the defendant pay 75 percent of the first plaintiff's costs of suit in the exception proceedings.

[57] An order will issue in the following terms:

1. The first plaintiff's exceptions (ie the abovementioned first and second exceptions) to the claims in prayers 3, 4 and 5 of the defendant's amended claim in reconvention, dated 25 May 2022, on the grounds that no causes of action are made out, are upheld.

2. Insofar as remains necessary, the abovementioned fourth exception to the defendant's amended claim in reconvention on the ground of vagueness and embarrassment is also upheld.

3. Insofar as remains necessary, the abovementioned third exception to the defendant's amended claim in reconvention on the ground of vagueness and embarrassment is dismissed.

4. The abovementioned fifth and sixth exceptions to the defendant's amended plea dated 25 May 2022 are dismissed.

5. The defendant is afforded 20 days from the date of this order to further amend its claim in reconvention.

6. The defendant shall be liable to pay 75 percent of the first plaintiff's costs of suit in the exception proceedings.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

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