



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **2624/2020**

In the matter between:

Plaintiff

TOURVEST TRAVEL SERVICES
[A DIVISION OF TOURVEST HOLDINGS (PTY) LTD]

and

**DEPARTMENT OF TREASURY, FREE STATE
PROVINCE**

First Defendant

MEC FOR FINANCE, FREE STATE PROVINCE

Second Defendant

**HOD: PROVINCIAL TREASURY, FREE STATE
PROVINCE**

Third Defendant

CORAM: **CRONJÉ, AJ**

HEARD ON: **28 APRIL 2023**

JUDGMENT BY: **CRONJÉ, AJ**

DELIVERED ON: **3 MAY 2023**

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 14h40 on 3 May 2023.

- [1] The Plaintiff instituted action against the Defendants wherein it claims R1 107 109.20 for services rendered. When it amended its particulars of claim, the Defendants filed a Notice in terms of Rule 23(1) of the Uniform Rules of Court stating that the Plaintiff's particulars of claim do not disclose a cause of action or are vague and embarrassing.
- [2] The Plaintiff did not address the objections and the Defendants thereafter filed an exception.

I THE TEST ON EXCEPTION

- [3] An exception that a pleading is vague and embarrassing strikes at the *formulation* of the cause of action *and its legal validity*. It is not directed at a particular paragraph within a cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing.¹
- [4] It has to go to the heart of the claim and the embarrassment must be to the extent that the defendant does not know the claim he has to meet. Vagueness would invariably be caused by a defect for *incompleteness in the formulation* and is therefore not limited to an absence of the necessary allegations but also extends to the way in which it is *formulated*. An exception will not be allowed, even if it is vague and embarrassing, unless the excipient will be seriously prejudiced if compelled to plead against which the objection lies.²

¹ Inzinger v Hofmeyer and others (7575/2010) [20101] ZAGPJHC 104 (4 November 2010) at paras 4 and 5

² Jowell v Bramwell-Jones and Others 1998 (1) SA 83 (W) at 905 E-H

II FIRST GROUND OF EXCEPTION

- [5] The first ground of exception is aimed at paragraph 6 of the particulars of claim that reads:

“6. During or about the period of 1 February 2015 to 30 March 2015, and at Bloemfontein, the Plaintiff, duly represented by Ms Shereen Morolo, and the First Defendant, duly represented by Mr MNG Mahlatsi, in his capacity as Chief Executive Officer of the First Defendant (‘the Department’), concluded a partly written, and partly oral agreement for the provision of travel agency services (‘the agreement’).” [my emphasis]

- [6] The written part of the agreement is a Service Level Agreement (“SLA”) signed by the representative of the Free State Provincial Treasury on 5 February 2015. The Plaintiff signed it on 10 February 2015.
- [7] The Plaintiff did not plead any terms of an alleged oral agreement. There is no information on this part of the agreement in the particulars of claim at all.
- [8] In Venter and Others NNO v. Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd,³ it was held:

“Generally, the information in a declaration or particulars of claim need only be sufficient for the defendants to plead thereto. The exception stage is not the time for the defendants [sic] to complain that he does not have enough information to prepare for trial or may be taken by surprise

³ 2008 (4) SA 639 (C) at para 14; Meechan and Another v VGA Chartered Accountants Partnership t/a PKF (VGA) Chartered Accountants [2020] 2 All SA 510 (GJ); Du Toit NO and Others v Steinhoff International Holdings (Pty) Limited and Others; Jacobus de Vos du Toit NO and Others v Jooste (16244/2018; 47916/2019) [2019] ZAWCHC 129; [2020] 1 All SA 142 (WCC) (30 September 2019) para 27 - 34

at the trial. That comes later in the (often long and cumbersome) journey to the doors of the court, after, inter alia, discovery of documents and requests for trial particulars had been made.” [my emphasis]

- [9] The particulars of claim is therefore vague and embarrassing and the first ground of the exception is upheld.

III SECOND GROUND OF EXCEPTION

- [10] The second ground of exception is that the Plaintiff fails to aver a date on which the oral agreement was concluded, where it was concluded, and what the material terms and conditions thereof was.

- [11] Paragraph 6 of the particulars of claim states that the agreement was concluded during or about 1 February 2015 to 30 March 2015 at Bloemfontein.

- [12] Notwithstanding that the terms were not pleaded, which is covered by the first ground of exception, there are references to time and place.

- [13] This ground of exception therefore fails.

IV THIRD AND FOURTH GROUNDS OF EXCEPTION

- [14] The Defendants’ objection is that the terms and conditions in annexures “POC1.3” and “POC1.5” are different from those in the SLA, and were signed prior to the date on which the SLA became binding. They rely on Clause 10.4 of the SLA that reads:

“This Agreement renders all contracts or agreements that previously might have been entered into by the parties in relation to Bid No. FSPT007/13/14, null and void and to be of no force and effect.”

[15] Clause 6.1 of the SLA provides that the Service User shall effect payment to the Plaintiff. It is common cause that twelve provincial government departments are the Service Users.

[16] In Annexure "POC1.3", Mr Mahlatsi, in his capacity as Chief Executive Officer of the First Defendant, *accepts* the Bid of the Plaintiff *"dated 5 February 2015 for rendering of services indicated in the document and/or further specified in the annexures"*. In paragraph 6 of "POC1.3", Mr Mahlatsi states:

"I undertake to make payment for the services rendered in accordance with the terms and conditions of the contract, within thirty (30) days after receipt of an invoice."

[17] In the table under paragraph 6, the description of the services was formulated as: *"FSPT007/13/14: Supply and Delivery of Travel Agency services to all Provincial Departments in the Free State Provincial Government"*. Mr Mahlatsi confirmed that he was duly authorized to sign the contract. It was signed at Bloemfontein on 5 February 2015 and an official stamp of the Department confirms the date. Annexure "POC1.5" contains the same provisions. The dates in these documents preceded 10 February 2015, when the SLA came into force.

[18] Mr MJ Merabe, for the Defendants, argued that clause 4.2 and clause 10.4 of the SLA makes it clear that no contracts previously concluded or entered into between the parties shall be binding. As annexures "POC1.3" and "POC1.5" are dated before 10 February 2015, they are not binding. The obligation to make payment was not that of Treasury but the Service Users.

[19] Mr M Sethaba, for the Plaintiff, argued that although the SLA was signed by the Plaintiff on 10 February 2015, it cannot, on a plain reading of the amended particulars of claim be stated that annexures "POC1.3" and "POC1.5" are null and void. He argues that the Defendants will not be without remedy and that they may still ask for further particulars.

- [20] I agree with Mr Merabe that the SLA, on its terms, only commenced on 10 February 2015. Clause 3 of the SLA, however, provides that the agreement is governed by and subject to the provisions of the bid documents and the SLA is concluded within the framework of the bid document. It also provides that in case of conflict between the SLA and the bid documents, it should be endeavoured to read the two documents together, failing which the provisions of the bid documents prevail, unless specifically stated otherwise.
- [21] The bid document was not appended to the particulars of claim and the Defendants did not take issue with this. Reading the pleadings as a whole, I cannot find that the Defendants do not know what case they have to meet or that they may be surprised at trial.
- [22] A Court should be mindful that evidence can be led which can disclose a cause of action. In LAWSA⁴ it is stated:

"A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action or defence. Causes of action are not in the first instance dependent on questions of law. They require the application of legal principle to a particular factual matrix. The test on exception is whether on all possible readings of the facts no cause of action is made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts."

- [23] In Pretorius and Another v Transport Pension Fund and Others,⁵ Froneman J summarised the process for assessing an exception as follows:

"In deciding an exception a court must accept all allegations of the fact made in the particulars of claim as true; may not have regard to any other

⁴ The Law of South Africa, Third Edition, Volume 4 -para 342; See also: South African National Parks v Ras 2002 (2) SA 537 at 541J – 542A

⁵ 2018 ZACC 10 at para [15]

extraneous facts or documents; and may uphold the exception to the pleading only when excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts.”

- [24] It may be required from a Court who hears the case to interpret the documents to find whether the annexures are affected by clause 10.4 of the SLA. Courts are reluctant to interpret contracts at the exception stage. In Picbel Groep Voorsorgfonds (in liquidation) v Somerville and other related matters⁶ the SCA held:

“[26] It is necessary first to say something about the proper approach to issues such as these on exception. In Lewis v Oneanate (Pty) Ltd and another⁷ Nicholas AJA stated that an excipient bears the burden of persuading the court that “upon every interpretation which the particulars of claim” and any agreement on which they rely “can reasonably bear, no cause of action is disclosed”. And, in Sun Packaging (Pty) Ltd v Vreulink⁸, Nestadt JA confirmed that there is no hard and fast rule that the interpretation of agreements is to be avoided on exception. He said: “As a rule, Courts are reluctant to decide upon exception questions concerning the interpretation of a contract. But this is where its meaning is uncertain . . . In casu, the position is different. Difficulty in interpreting a document does not necessarily imply that it is ambiguous . . . Contracts are not rendered uncertain because parties disagree as to their meaning.”

and:

⁶ [2013] JOL 30247 (SCA); [2013] ZASCA 24

⁷ Lewis v Oneanate (Pty) Ltd and another [1992] 2 All SA 488 (1992 (4) SA 811) (A)

⁸ Sun Packaging (Pty) Ltd v Vreulink [1998] JOL 355 (1996 (4) SA 176) (A)

[39] ... In Dettmann v Goldfain and another⁹, this Court stated that courts are, in some instances, reluctant to “decide upon exception questions concerning the interpretation of a contract”. Those circumstances are, first, where the entire contract is not before the court; and secondly, where it appears from the contract or the pleadings that “there may be admissible evidence which, if placed before the Court, could influence the Court’s decision as to the meaning of the contract”, provided that this possibility is “something more than a notional or remote one”.

[25] In “POC1.3” and “POC1.5”, Mr Mahlatsi refers to the Plaintiff’s offer of 5 February 2015 and signed the annexures and the SLA on 5 February 2015. There are, on the papers, at this stage of the enquiry sufficient averments.

[26] I conclude that the particulars of claim, read with the annexures, is not vague or embarrassing to the extent that the Defendants will be prejudiced in pleading, nor that no cause of action is pleaded.

[27] I, therefore, find no substance in these grounds of exception.

V COSTS

[28] The Defendants were successful in respect of the first ground and, although unsuccessful on the other grounds, should be entitled to their costs.

ORDER:

I make the following orders:

1. The Defendants’ exception in respect of the first ground of exception is upheld.

⁹ Dettmann v Goldfain 1975 (3) SA 385 (A) at 400A–B [also reported at [1975] 3 All SA 430 (A) – Ed].

2. The exceptions in grounds 2, 3 and 4 is dismissed.
3. Leave is granted to the Plaintiff to amend the particulars of claim within 15 days of this order.
4. Plaintiff pays the costs of the exception.

P R CRONJé, AJ

On behalf of the Plaintiff:

Adv. M Sethaba

Instructed by:

Cliffe Dekker Hofmeyer

McIntyre Van der Post Attorneys

BLOEMFONTEIN

On behalf of the Defendants:

Adv MJ Merabe

Instructed by:

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