

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 20/37767

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO
2.OF INTEREST TO OTHER JUDGES: NO
3.REVISED NO


Judge Dippenaar

In the matter between:

METANZA METALLURGICAL LABORATORIES (PTY) LTD
(REGISTRATION NUMBER 2015/158442/07)

Plaintiff

and

RADOS INTERNATIONAL SERVICES SA (PTY) LTD
(REGISTRATION NUMBER 2013/064812/07)

Excipient/Defendant

JUDGEMENT

Delivered: This judgement was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 15th of September 2022.

DIPPENAAR J:

[1] The defendant raises two related exceptions against the third claim of the plaintiff in action proceedings instituted against it, on the basis that the particulars of claim are vague and embarrassing alternatively fail to disclose a cause of action against it. The plaintiff's third claim relates to the payment of certain outstanding salaries, accumulated leave pay, agreed upon sales bonuses and performance bonuses due to Mr Snyman, who had ceded his claim to the plaintiff. The exceptions relate to the performance bonus portion of the plaintiff's third claim and relate to paragraphs 17.3, 17.4 and annexure M11.

[2] Both exceptions have their origin in the phrase "*KPI's¹ and objectives*" and the absence of a recordal of objectives to be discussed and agreed upon between the parties on an annual basis. The trigger event for the annual performance bonus to be payable was an achievement of the KPI's and objectives. In paragraph 17.3 the plaintiff pleaded that those elements were solely recorded in annexure M11, wherein no reference is made to the phrase "and objectives".

[3] The exceptions are predicated on the contention that annexure M11 does not record the objectives to be discussed and agreed upon between the parties on an annual basis but only refers to the KPI's. The excipient argued that they are two separate elements whereas the plaintiff argued that evidence could be led that they are not separate elements but indeed one and the same thing, analogous to the phrase "terms and conditions".

[4] The first exception is that as annexure M11, insofar as it is relied upon to sustain the contents of paragraphs 17.3 and 17.4 of the particulars of claim does not record the

¹ Key performance indicators"

objectives to be discussed and agreed upon between the parties on an annual basis. The second exception relies on the grounds advanced in the first exception and concludes that the required objectives could accordingly not have remained the same as was initially negotiated and recorded in M11, as averred in paragraph 17.4 of the particulars of claim.

[5] In summary, the plaintiff's case in relation to the performance bonus claim was that Mr Snyman was employed by the defendant in terms of a written employment contract and also had a written agreement with the defendant for the payment of an annual performance bonus, which would be R500 000 per year and would be payable to the plaintiff upon the achievement of pre-agreed KPI's and objectives in each such year. The KPI's would be discussed and agreed upon, either orally or in writing or by conduct on an annual basis and if not specifically discussed it would remain the same as the previous year's KPI's. At the outset of Snyman's employment, the KPI's were agreed upon and recorded in M11 to the particulars of claim². The KPI's were then, on an annual basis agreed upon, either in writing or orally or by conduct, or it remained the same as was recorded initially in M11. The agreed upon KPI's were all met by the plaintiff and the defendant paid the agreed upon annual performance bonus for the years 2014 and 2015. The claim relates to the annual performance bonuses for the years 2016 and 2017.

[6] In paragraph 17.1 of the particulars of claim, KPI's are referred to as "*the objectives and deliverables (KPI's)*". The agreement attached as annexure M9 to the particulars of claim refers in clause 8.1 to "*pre-agreed KPI's and objectives*".

[7] The relevant paragraphs of the particulars of claim read:

"17. 3 Soon after the Snyman Agreement's conclusion, and in terms of the Snyman Agreement as pleaded in paragraph 15.13 supra, the parties, represented as aforesaid, agreed that the KPI's will remain the same as was recorded in Annexure "M11".

² Par 17.2

17.4 The KPI's was thereafter, annually, and in terms of the Snyman Agreement, pleaded *supra*, either orally or by conduct agreed to remain the same as was initially negotiated and recorded in Annexure "M11".

[8] Prior to considering the exceptions on their merits it is apposite to refer to certain general principles. The starting point is that exceptions provide a mechanism to "*weed out cases without legal merit*".³ In considering an exception, the court must assume that the facts alleged in the relevant pleading are correct and no additional facts may be adduced by either party⁴.

[9] To succeed in an exception on the basis that the claim discloses no cause of action, an excipient must show that no possible evidence led on the pleadings could sustain a cause of action⁵ and that the claim is excipiable on every reasonable interpretation or construction of the pleaded facts⁶, considering the pleading as a whole⁷.

[10] To succeed in an exception that a claim is vague and embarrassing, the onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice⁸. The excipient must also illustrate that the defect goes to the heart of the pleading and the excipient does not know what claim is has to meet⁹ and that the excipient has illustrated both vagueness amounting to embarrassment and embarrassment amounting to serious prejudice¹⁰. This may arise *inter alia* because the statement lacks sufficient particularity, contains contradictory averments or contains defects in the formulation of the claim.¹¹

³ Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority Sa 2006 (1) SA 461 (SCA) para [3]

⁴ Picbel Group Voorsorgfonds v Somerville 2013 (5) SA 496 (SCA) 511-512

⁵ McKelvey v Cowan NO 1980 (4) SA 525 (Z) at 526D-E

⁶ Francis v Sharp 2004 (3) SA 230 (C) at 237D-I; Stewart v Botha 2008 (6) SA 310 (SCA) at 313E-F; H v Fetal Assessment Centre 2015 (2) SA 193 (CC) at 199A-C

⁷ Nel and Others NNO v Mc Arthur 2003 (4) SA 142 (T) at 149F

⁸ Vlok and Others v Georgiou and Others [2020] 1 All SA 884 (GP)

⁹ Jowell v Bramwell-Jones & Others 1998 (1) SA 836 (W) 899E-F, 905E-I

¹⁰ Vlok and Others v Georgiou and Others [2020] 1 All SA 884 (GP)

¹¹ Trope v South African Reserve Bank 1992 (3) SA 208 (T) 211-213

[11] The excipient's case was that the plaintiff's pleading fails to set out any recordal of the objectives, allegedly agreed upon in annexure M11, both at the time of the conclusion of the initial agreement and thereafter upon renewal and that there is an inconsistency between the third claim and the document relied upon as a basis for the third claim.

[12] It was argued that no further evidence can possibly be led by the plaintiff which can disclose any cause of action, based on the absence of the trigger event on the plaintiff's own version, where it relies upon the fact in its pleading that the objectives are solely recorded in annexure M11. The defendant thus does not know what case it has to meet. According to the excipient, upon every interpretation which the particulars of claim can reasonably bear, absent the trigger event relied upon by the plaintiff itself, no cause of action can be established.

[13] The plaintiff opposed the exception on the basis it could lead evidence that the KPI's were in terms of the agreement annually agreed upon and that the agreed upon KPI's annually remained the same as was recorded in annex M11. It was argued that sufficient facts were pleaded in paragraph 17.1 to encompass both the KPI's and objectives and that evidence could be led that they are the same thing as it is an interpretational issue. The plaintiff was further not required to plead *facta probantia*, only *facta probanda*. Insofar as there was any ambiguity, it could be clarified in evidence at the trial.

[14] The test on exception is whether on all possible readings of the facts, no cause is made out¹². If evidence can be led which can disclose a cause of action or defence alleged in a pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action or defence.¹³

¹² Astral Operations v Nambithi Distributors (Pty) Ltd [2013] 4 All SA 598 (KZD)

¹³ Belet para 2; The trustees for the Time Being of the Bus Industry Restructuring Fund v Break Through Investments CC and Others [2008] 1 SA 23 (SCA) at [11]

[15] As held by the Supreme Court of Appeal in Belet:

If evidence can be led which can disclose a cause of action or defence alleged in a pleading that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action.¹⁴

[16] The excipient must illustrate that the pleadings cannot reasonably bear the meaning contended for by the plaintiff. The excipient invited the court to interpret the agreement and find that there is no ambiguity. The plaintiff contended for the opposite position.

[17] The plaintiff argued that the particulars of claim, in paragraphs 17.3 and 17.4 as read with paragraph 15.13 and annex M11, laid a basis for the plaintiff to at least testify that the KPI's were agreed upon, met and not paid.

[18] Insofar as the wording of the particulars of claim is ungrammatical and ambiguous, i.e. capable of more than one meaning, the uncertainty attaching to the pleader's intention cannot avail an excipient unless he shows that on either construction of the ambiguous claim it is excipiable.¹⁵ In relation to pleading the terms of an agreement, the test on exception is whether the trial court could, not should, reasonably imply the terms alleged.¹⁶

[19] The particulars of claim in paragraph 15 give a certain interpretation to the agreement in averring the salient express and/or implied terms of the agreement.

[20] In paragraph 16 it is averred that:

¹⁴ Belet Industries CC t/a Belet Cellular v MTN Service Provider (Pty) Ltd (936/2013) [2014] ZASCA 181 (24 November 2014) ("Belet") para 2 and the authorities cited therein

¹⁵ Pete's Warehousing and Sales CC v Bowsink Investments CC [2000] 2 All SA 266 (E) 271-272;

¹⁶ Collender-Easby v Grahamstown Municipality 1981 (2) SA 819 (E)

"In as far as the Court finds that the interpretation of the Agreement/s, differs in any specific respect, in that what is pleaded *supra*, such arose as a drafting error in the Agreement/s *alternatively* a mistake common to the parties, which stands to be rectified to read as pleaded *supra*".

[21] An excipient faced with an ambiguity as to the other pleader's intention must show that on either construction the claim is excipiable¹⁷. An excipient must further persuade the court that upon every reasonable interpretation of the averments, no cause of action is established thereby¹⁸

[22] I do not agree with the excipient's argument that there are no issues of interpretation because paragraphs 17.3, 17.4, clause 8.1 of annexure M9, annexure M11 are unambiguous or that there is only the mere notional or remote possibility that evidence of surrounding circumstances may influence the issue.

[23] It cannot in my view be concluded the plaintiff's case is "*entirely based on conjecture and speculative hypothesis, lacking any real foundation in the pleadings or in the obvious facts*".¹⁹

[24] It is well established that exceptions are generally not the appropriate procedure to settle questions of interpretation.²⁰ The circumstances under which a court would be reluctant to decide upon exception questions concerning the interpretation of a contract are²¹:

"... first where the entire contract is not before the court and secondly, where it appears from the contract or on 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.'"

¹⁷ Picbel Groep Voorsorgfonds v Somerville [2013] 2 All SA 692 (SCA) para [7]

¹⁸ Pikitup Johannesburg SOC Limited v Nair (Maharaj and others as third parties) [2019] 3 All SA 899 (GJ)

¹⁹ Telematrix para [3]

²⁰ Picbel *supra*

²¹ Picbel *supra* para [39]

[25] Considering the arguments advanced at the hearing, the present situation in my view squarely falls within the second category.

[26] Moreover, the defendant upon at least one interpretation of paragraphs 17.3 and 17.4 will be able to plead thereto and the evidence the plaintiff will be able to lead upon that interpretation could disclose a cause of action.

[27] The interpretation of M11 and the phrase “KPI and objectives” can in my view only be interpreted after evidence has been led. The phrase gives rise to difficulties in interpretation which in exception proceedings cannot be construed without the benefit of evidence relating to the full factual matrix. On the language used there are ambiguities or more than one interpretation. Considering the contents of annexures M9 and M11 there are also inconsistencies which require clarification and interpretation in evidence.

[28] In the present context it is also apposite to refer to the principle that rule 23 cannot be used to attack the vagueness of a contract relied upon by a party; it is only concerned with vagueness in the pleadings.²² The agreement relied on by the plaintiff in annexure M11 is contained in email correspondence and not in a formal agreement. The agreement reflected in annexure M11 is in certain respects vague.

[29] As stated by Lewis JA in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* ²³:

“The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded....In addition a contract must be interpreted so as to give it a commercially sensible meaning.”

²² *Screening & Earthworks (Pty) Ltd v Capital Outsourcing Group (Pty) Ltd*; *Capital Outsourcing Group (Pty) Ltd v Screening & Earthworks (Pty) Ltd* [2008] 1 All SA 611 (B)

²³ 2013 (5) SA 1 (SCA) at paras 24-25, quoted in *Belet*, para [6]

[30] Applying those principles, evidence may well be required to determine a proper interpretation of the agreement.

[31] It is further trite that a party is only required to plead the *facta probanda*, and that a plaintiff's pleading must set out every material fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment.²⁴

[32] A distinction must be drawn between *facta probanda* and *facta probantia*. The excipient complained that there were no facts pleaded in respect of the objections. One of the central departure points between the parties is whether KPI's and objectives is one concept or two distinct concepts. That would involve *facta probantia* rather than *facta probanda*. Evidence can thus be led on the meaning of the term at trial to place it in its proper context.

[33] For these reasons, I conclude that the exceptions must fail. There is no basis to deviate from the normal principle that costs follow the result.

[34] I grant the following order:

The exceptions are dismissed with costs.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

²⁴ *Mc Kenzie v Farmers Cooperative Meat Industries Ltd* 1922 AD 16 at 23

APPEARANCES

DATE OF HEARING	: 25 July 2022
DATE OF JUDGMENT	: 15 September 2022
PLAINTIFFS COUNSEL	: Adv. J Brand SC : heads drawn by Adv. DA De Kock
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