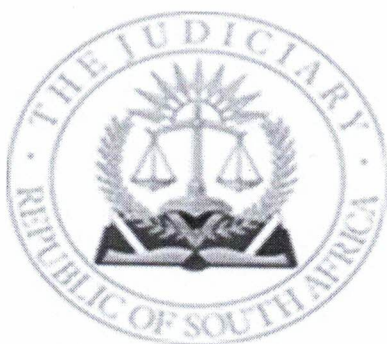




**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**Case No: 74482/2014**

|                                                                                                 |
|-------------------------------------------------------------------------------------------------|
| (1) REPORTABLE: NO                                                                              |
| (2) OF INTEREST TO OTHERS JUDGES: NO                                                            |
| (3) REVISED: NO                                                                                 |
| 9 MARCH 2021...<br>DATE                                                                         |
| <br>SIGNATURE |

In the matter between:

**REMERES BEKKER**

Plaintiff/ Respondent

and

**APPRICA LABS (PTY) LTD**

First Defendant / Applicant

**THOUGHT INC (PTY) LTD**

Second Defendant/ Excipient

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 March 2021.)

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**JUDGMENT**

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**MIA J:**

[1] This is an exception against the plaintiff's particulars of claim premised on the basis that it lacks averments necessary to sustain a cause of action against the second defendant. The full grounds set out in the exception are:

- "1. On or about 14 January 2019 the Plaintiff sued out Summons and Particulars of Claim in the above-named matter.*
- 2. It is pleaded by the Plaintiff that the First Defendant obtained the services of the Second Defendant in order to procure assistance for the development of the app which forms the basis of the Plaintiffs claim in the action.*
- 3. The Plaintiff fails to plead any contractual nexus between itself and the Second Defendant.*
- 4. The Plaintiff fails to plead any contractual obligations owed to it by the Second Defendant,*
- 5. The Plaintiff fails to plead that the Second Defendant failed to fulfil any contractual obligations owed by the Second Defendant to the Plaintiff,*
- 6. The Plaintiff falls to set out how and in what respects the Second Defendant is in any way Indebted to the Plaintiff.*
- 7. Accordingly, the Particulars of Claim do not make out a cause of action against the Second Defendant."*

[2] The excipient's main contention in the exception is therefore simply that the plaintiff's particulars of claims fails to make out a claim against the second defendant. The plaintiff failed to make reference to the second defendant in any of the paragraphs in paragraph four of the particulars of claim where the plaintiff refers to the agreement entered into between the plaintiff and the first defendant. Thus the excipient contends the pleading is rendered excipiable for failing to disclose a cause of action in respect of the excipient.

[3] Plaintiff's claim is based on a written agreement with the first defendant on 24 October 2013, to develop an app for the price of R95 400.00 (excluding VAT). A further written agreement was entered into on 30 June 2014 relating to the development of the app. The first defendant enlisted the assistance of a third party, the excipient. The plaintiff agreed to pay fifty percent in advance, twenty-five percent during the development of the app and the final twenty-five percent upon completion of the project. The written agreements between the plaintiff and the first defendant signed on 24 October 2013 and on 30 June 2014 were attached to the particulars of claim. The agreements appear to have as their objective of the first defendant designing and developing a mobile app according to the plaintiff requirements.

[4] In *Data Color International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] All SA 581 (A) at paragraph [1] the Court stated:

"Repudiation has sometimes been said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, "accepting" and thus completing the breach. So for example Winn LJ remarked in *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699 at 731F-732A:

"Where A and B are parties to an executory contract, if A intimates by word or conduct that he no longer intends, or is unable, to perform it, or to perform it in a particular manner, he is, in effect, making an offer to B to treat the contract as dissolved or varied so far as it relates to the future. If B elects to treat the contract as thereby repudiated, he is deemed, according to the language of many decided cases, to 'accept the repudiation' and is thereupon entitled (a) to sue for damages in respect of any earlier breach committed by A and for damages in respect of the repudiation, (b) to refrain from himself performing the contract any further."

[5] Uniform Rule 23 provides for exceptions as follows:

- “(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception:
- (2) ...
- (3) Wherever an exception is taken to any pleading the grounds upon which the exception is founded shall be clearly and concisely stated.
- (4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.”

[6] The general approach in respect of the excipiability of pleadings is succinctly stated by Majiedt AJP (as he was then) in *Beets v Swanepoel* [2010] JOL 26422 (NC) at paragraph [14]:

”that an exception must raise a substantive question of law which may have the effect of settling an issue between the parties.<sup>1</sup> A pleading will only be excipiable if no possible evidence led on the pleadings as they stand can disclose a cause of action.<sup>2</sup> Exception is an appropriate way of settling a point of law.<sup>3</sup> The excipient must prove that on every interpretation which the court may attribute to the particulars of claim, it remains excipiable.”<sup>4</sup>

[7] Ms Adams, counsel, appearing for the excipient argued that Rule 18(4) required that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, and with sufficient particularity to enable the opposite party to reply thereto. Furthermore that that pleadings are the written statements of the

<sup>1</sup> *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) at 514F - G.

<sup>2</sup> *Mckelvey v Cowan* NO 1980 (4) SA 525 (Z) at 526H

<sup>3</sup> *Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA177 (NC) at 181D - E.

<sup>4</sup> *Theunissen & Andere v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E; *Stewart & another v Botha & another* 2008 (6) SA 310 (SCA) [also reported at [2009] JOL 24012 (SCA) - Ed] at para [4]

parties served by each party in turn upon the other, which must set out in summary form the material facts upon which each party relies in support of his claim or defence, as the case may be. The purpose of pleading is to define the issues so as to enable the other party to know what case he/she has to meet. It is essential to the judicial process that the facts have to be established.

- [8] She argued that it was the plaintiff's duty firstly to allege the facts upon which he relies and further, his second duty was to set out the conclusions of law which he claims, follow from the pleaded facts. Facts and conclusions of law must, however, be kept separate. The facts set out must constitute the premises for the relief sought, she continued. In other words, they must be such that the relief prayed for flows from them and can be properly granted. Failing this, the summons will be excipiable as disclosing no cause of action she concluded. She submitted that whilst there is no exhaustive test to determine whether a pleading contains "sufficient particularity" for the purposes of this sub-rule, it is essentially an issue of fact. A pleading contains sufficient particularity if it identifies and defines the issues in such a way that it enables the opposite to know what they are to respond to. It is to be noted that the degree of particularity will depend upon the circumstances of each case.

- [9] Applying the general principles, above to the present matter she submitted that from a perusal of the plaintiffs Particulars of Claim, the plaintiff has not pleaded all of the material facts that are necessary for purposes of establishing a cause of action. In particular, she continued, the necessary averments have not been made regarding the plaintiff's claim for repudiation premised on cancellation of 'the agreement', when one considers the following:

- 9.1 The plaintiff has failed to plead any contractual nexus between itself and the second defendant;
- 9.2 The plaintiff has failed to plead any contractual obligations owed to it by the second defendant;

9.3 The plaintiff has failed to plead that the second defendant failed to fulfil any contractual obligations owed by the second defendant to the plaintiff;

9.4 The plaintiff has failed to set out how and in what respects the second defendant is in any way indebted to the plaintiff.

[10] In view of the above, failure on the part of the plaintiff she submitted that the failure to allege any of the above is fatal to its claim as no possible evidence could be led on the pleadings to disclose a cause of action. Furthermore, she continued, the facts set out in the plaintiffs Particulars of Claim do not constitute the premises for the relief sought. In other words, she submitted the relief prayed for which flows from them cannot be properly granted. Accordingly, she submitted that the Particulars of Claim do not make out a cause of action as against the second defendant and is, therefore, excipiable. The excipient she submitted set out adequate grounds to demonstrate why the exception that it has brought, should be upheld. She consequently moved for an order in terms of the draft order prayer for in the exception.

[11] Mr Blignaut, appearing for the plaintiff, argued that the excipient states in his exception that the respondent fails to plead any contractual nexus between the excipient and the respondent. This view he submitted ignored that in paragraph 5 of the particulars of claim the plaintiff pleads in fact that a tacit agreement was entered into between the respondent /plaintiff and the excipient when the first defendant obtained the services of the excipient to assist the first defendant in the development of the app. He continued that it was the excipient's own version that an agreement was entered into between the respondent and the excipient as second defendant. Furthermore it was the excipient who states in his opposing affidavit that that on the basis that the agreement was entered into that he received payment for the services rendered.

[12] Mr Blignaut continued that the fact that the first defendant co-opted the excipient to assist with the development of the app (with the knowledge of the

respondent) and that payments were made by the respondent to both defendants is a clear indication that the excipient had knowledge of and accepted the contractual relationship between the first defendant and respondent and likewise that a tacit agreement was formed between the excipient and the respondent. Indeed, he submitted that the whole question regarding the excipient's exception is totally interwoven with the evidence which is to be led at the trial regarding the contractual relationship between the excipient and the respondent as plaintiff. The respondent/ plaintiff accepted that the knowledge regarding the contract in respect of the excipient was knowledge at the disposal of the first defendant and the respondent would have to rely on the first defendant to lead same at trial. In the light of the foregoing he submitted that the exception be dismissed with costs, alternatively that the Court in its discretion should order that the exception should stand over and be postponed until the trial as was held in *Versluis v Greenblatt* 1973 (2) SA 271 (NC). Finally he submitted that the exception be dismissed with costs, alternatively be postponed until the trial.

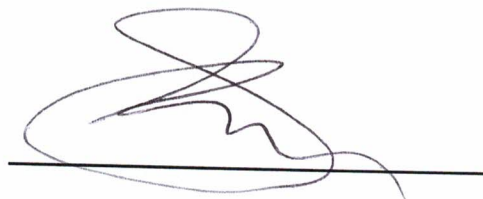
- [13] I agree with Ms Adams that the averment made in the plaintiff's particulars of claim are not such that enable the excipient to plead thereto. They fail to plead any contractual nexus between plaintiff and the second defendant; they fail to plead any contractual obligations owed to plaintiff by the second defendant; the plaintiff has failed to plead that the second defendant failed to fulfil any contractual obligations owed by the second defendant to the plaintiff; and to specify such and finally the plaintiff has failed to set out how and in what respects the second defendant is in any way indebted to the plaintiff. This is especially so when the agreement attached was concluded with the first defendant and the plaintiff has already obtained a judgment in the matter against the first defendant according to Mr Blignaut.
- [14] Even when regard is had to the repudiation, the agreement is concluded with the first defendant. The plaintiff has not indicated any communication in this regard or agreement that it relies on with the excipient. Mr Blignaut suggested that unfortunately the plaintiff has no evidence in this regard and relies on the

first defendant against whom it has taken judgment to be subpoenaed as a witness. At present the plaintiff has no case to which the excipient can be expected to answer and given the first defendant already had a judgment against it for the same matter it is in the precarious position where judgment has been taken against it by the plaintiff it is the most undesirable and unreliable source of evidence where there are no written agreements on which the plaintiff can rely on. It cannot make out its case against the second defendant.

### **ORDER**

[16] In the result:

1. The exception is upheld.
2. The plaintiff's particulars of claim is struck out with costs



**S C MIA**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

### **APPEARANCES:**

|                                |       |                    |
|--------------------------------|-------|--------------------|
| On behalf of the applicant     | :     | Adv R Adams        |
| Instructed by                  | :     | Ramsden Small Inc. |
| <br>On behalf of the applicant | <br>: | <br>Adv J Blignaut |
| Instructed by                  | :     | Bekker Attorneys   |
| <br>Matter Heard On            | <br>: | <br>8 March 2021   |

Judgment Reserved On : 8 March 2021  
Judgment Delivered On : 9 March 2021