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

Case No: 046271/2022

(1) Reportable: NO
(2) of interest to other judges: NO
(3) REVISED: YES
DATE: 14 May 2024
SIGNATURE

In the matter between:

TIKKA TIKKA PROJECTS (PTY) LIMITED

First Applicant

MICHAEL BRUNI (ID: 5[...])

Second Applicant

KONSTANDINA BRUNI (ID: 6[...])

Third Applicant

**MARIA MAGDALENA VAN VUUREN
(ID: 6[...])**

Fourth Applicant

KOBUS VLOK (ID: 8[...])

Fifth Applicant

And

CARRIM HOLDINGS (PTY) LTD

RESPONDENT

JUDGMENT

LESO AJ.

INTRODUCTION

1. Tikka Tikka Project (Pty) Ltd took an exception to Carrim Holdings' particulars of claim complaining that the reliance on tacit acceptance of a credit agreement between the parties leads to confusion about whether a written or oral agreement is relied upon by Carrim Holdings.

BACKGROUND

2. On 15 February 2023 and 22 March 2023 Tikka Tikka took exception to some of Carrim Holdings' particulars of claim and on 17 April 2023 Carrim Holdings attended to remove the cause of complaint by amending its declaration. Under Carrim Holdings' subsequent amendment, Tikka Tikka raised a new exception to Carrim Holdings' declaration on 03 May 2023. The matter was then set down for hearing on opposed roll after Carrim declined to remedy the alleged defect in its particulars of claim as it was called upon to do so by Tikka Tikka. Tikka Tikka did not file the heads of arguments nor did they attend the proceedings in court and Carrim proceeded to argue the matter in its absence.

Grounds of Exception

3. Tikka Tikka grounds for exception are as follows:
 - 3.1 Particulars amount to an irregular step;
 - 3.2 The particulars are expiable and/or;
 - 3.3 The particulars fail to disclose a cause of action and/or;
 - 3.4 Particulars are vague and embarrassing; and/or;

3.5 Defendant will be embarrassed in pleading thereto.

4. The subject matter of this application is found in Tikka Tikka's second exception of March 2023 where the cause of complaint firstly relates to Carrim Holdings' reliance on a tacit acceptance and a written credit agreement, secondly, Tikka Tikka alleged that Carrim Holding has not pleaded when the tacit acceptance occurred. Tikka Tikka complains that in paragraph 4 of the particulars, Carrim Holdings pleads *that 'on/or about 06 April 2022 at Centurion the plaintiff duly represented and the 1st defendant duly represented by the 2nd, 4th and 5th defendant concluded a written Credit Facility Agreement in the form application for credit facility made by the 1st defendant tacitly accepted the plaintiff incorporating the standard Terms and Conditions applicable to the sale of goods and the provision of services and Deed Of Suretyship'*.
5. According to Tikka Tikka, the last copy of the agreement marked as annexure "D2" was not signed by Carrim Holdings and Carrim Holdings failed to plead whether the purported application made by the defendant was accepted in writing, alternatively communicated orally to Tikka Tikka by the Carrim Holding. Tikka Tikka claims that it is unsure what Carrim Holdings is referring to when pleading that the first Defendant was tacitly represented by certain parties, lastly, Tikka Tikka relied on the provision of Rule 18(6) and Sub-rule (4) of the Uniform Rules.
6. Before the Court counsel representing Carrim Holdings contended that on 06 April 2022 at Centurion Tikka Tikka concluded a written application for credit facilities and the application was tacitly accepted by Tikka Tikka. According to counsel representing Carrim Holdings, Tikka Tikka breached the terms of the agreement that incorporated a deed of Suretyship respectively binding the second to fourth respondents by failing to effect payment for the purchased goods within 30 days from the date of the statement after it ordered and purchased various goods and or services from Carrim on 23 May 2022 and 22 June 2022.

7. According to Carrim Holdings acceptance(tacit) occurred during the conclusion of the written agreement, a copy of which is attached to the pleadings. Counsel representing Carrim argues that the reliance by Carrim Holding on tacit acceptance and the written agreement needs no further averment because there are no formal requirements in South African Law of Contract in respect of Offers or acceptance and that there is a distinction between the conduct of the parties preceding the conclusion of a contract and the conclusion of the contract itself. He explains the Oxford dictionary meaning of tacit and the legal meaning as he submits that the dictionary meaning of tacit is indirectly or understood, rather than said in words' while the legal definition refers to tacit contracts are contracts that are inferred from the conduct of the parties as opposed to written or verbal agreements embodying coinciding expressions of intention'. Counsel submits that there are no formality requirements in South African law of contract in respect of offers however the National Credit Act creates an exception to the rule in the agreements subject to the National Credit Act, 34 of 2005.

ISSUES TO BE DETERMINED

8. Whether Carrim Holdings' claim that the written agreement was tacitly accepted is vague and embarrassing and whether Carrim Holdings allegation of the conclusion of a written agreement and tacit acceptance of such agreement is inadequate due to the absence of the date of such acceptance.

DISCUSSION AND APPLICABLE LAW

9. The law on exception is found in Rule 23(1) of the Uniform Rules¹ that
(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(. . .)'.*

¹ See Rule 23(1) of the Uniform Rules of the High Court,

The above rule directs the court to mainly focus on the content of the plaintiff particulars of the claim form part of the pleadings as regulated by Rule 18, the rule relating to pleading generally. Sub-rule (4) and sub-rule (6) of the above-mentioned rule require the pleadings to contain a clear and concise statement of material facts with sufficient particularity to enable the opposite party to reply and the plaintiff who relies upon the contract to state if the contract was in writing or orally, where and when it was concluded and if it was a written agreement to attach a copy of the agreement².

10. It is common cause that the cause of action is based on the breach of a credit agreement concluded between the parties wherein Carrim Holding provided goods to Tikka Tikka and Tikka Tikka failed to make payment. Tikka Tikka has not denied performance by Carrim Holdings based on the agreement. A copy of a credit agreement is attached by Carrim Holding as part of the pleadings. My analysis of the Tikka Tikka objection appears to be that it is not known whether the agreement was tacitly agreed upon by Carrim and when it was accepted by Carrim Holdings because the agreement was not signed. I wish to indicate outright that Carrim Holdings' argument on the interpretation of the wording used in its particulars of claim and the validity of the agreement itself goes to the merits of this matter which this court is not ceased with. Tikka Tikka is not satisfied with the court's view about the issue of interpretation in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*³ will assist in the distinction between a tacit term and the expressed terms of the contract. In this case the court stipulated that '*an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances, whether a contract contains such a term is a question of interpretation*'.

² See Rule 18(4) and Rule 18(6) on the Uniform Rules

³ See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974(3) All SA 497,,*Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 (3) All SA 24.

11. I have analysed the content of the particulars of the claim subject to the complaint and the relationship between the parties, the nature of the claim, and the answer to the question of whether Carrim Holding's claim of tacit acceptance and a written agreement is embarrassing should be adverse. Without dealing with the interpretation of Carrim Holding's pleadings, I found that both parties agreed to the terms of the credit agreement to the extent that Carrim had performed under the contract. Rule 18(5) cautions the litigants in their pleadings to answer the point of substance and not to be evasive in the denial of an allegation of fact raised in the previous pleading⁴. provides that 'When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively, but shall answer the point of substance' and Rule 18(7) 'It shall not be necessary for any pleading to state the circumstances from which an alleged implied term can be inferred.'
12. The rest of the issues raised by Tikka Tikka in this application should be dealt with in their plea and counterclaim while the Carrim Holdings argument and explanation of what it meant by tacit acceptance and written agreement will be canvassed in the main proceedings. In the same breath, Tikka Tikka did not dispute or challenge the existence of the agreement. Unfortunately, a no-show in court by Tikka Tikka and failure to file its heads of argument left the court with speculations about what Tikka Tikka's objection is about. It cannot be correct that Carrim Holdings particulars failed to disclose the cause of action because Tikka Tikka has agreed that there was a written agreement between the parties the rest of the issues raised on the agreement itself go to the merits of the case which can be dealt with in Tikka Tikka's plea and counterclaim.
13. The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced and the onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment

⁴ See Rule 8(5) which provides that '*When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively, but shall answer the point of substance.*'

amounting to prejudice as it was held in *Quinlan v MacGregor*⁵. Peter Van Blerk I writes that *'in determining whether or not a pleading fails to disclose a cause of action or defense it must be remembered that if the pleadings can bear more than one meaning the excipient must satisfy the court that on all its meanings the pleadings is bad'*⁶. In *Trope v South African Reserve Bank*⁷ the court held that *'an exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced.'*

CONCLUSION

14. I found that the exception raised by Tikka Tikka is technical and does not render the plaintiff's pleadings or declaration expiable. The function of an exception was explained by the court in *Trope*. In *South African National Parks v Ras 2002 (2) SA 537 (C) at 541*, it was held that unless the excipient can satisfy the court that there is a real point of law or a real embarrassment, the exception should be dismissed.
15. I find that Tikka Tikka's exception to Carrim Holding particulars of claim cannot stand and it is therefore dismissed.

COSTS

16. At the end of his submissions, Carrim Holding's counsel argued that the exception be dismissed with costs on the attorney and client scale however there was no substantive argument on this issue.

THEREFORE, I MAKE THE ORDER AS FOLLOWS:

⁵ See *Quinlan v MacGregor*⁵ 1960 (4) SA 383 (D) at 393G; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) and *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W) at 421J–422A.

⁶ See Peter Van Blerk *Legal Drafting, Civil Proceedings*, second edition, page 50.

⁷ See *Trope v South African Reserve Bank*⁷ 1992 [3] SA 208 T at `221A-E.

ORDER

1. Exception is dismissed.
2. The defendant must file its plea and counterclaim if any within 10 days of this order and judgment.
3. Costs to be determined in the trial court.

The judgment was handed down electronically and by circulation to the parties/ legal representatives by e-mail and by uploading to Caseline. The date of hand down is the date when the judgment was signed.

**J.T LESO
ACTING JUDGE OF THE HIGH COURT,
SOUTH AFRICA, GAUTENG DIVISION, PRETORIA**

Date of Hearing: 26 February 2024

Date of Judgment: 14 Mar 2024

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