

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 13374/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	
.....	<u>4 July 2024</u>
SIGNATURE	DATE

In the matter between:

BIZZ TRACERS (PTY) LTD

1st Excipient/1st Applicant

RATLHOGO PETER CALVIN RAFADI

2nd Excipient/2nd Applicant

And

ESKOM HOLDINGS SOC LTD

Respondent/Plaintiff

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 4 July 2024 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10h00 on 4 July 2024.

MNISI AJ

- [1] This is an exception to the plaintiff's particulars of claim taken by the first and second defendants ("the excipients/defendants"). The defendants complain that the particulars of claim has failed to catalogue and allege that the first defendant's breach of contract and its right to cancel and claim restitution which accrued to it due to the breach. Moreover, the defendants complain that the particulars of claim lack averments necessary to sustain a cause of action.
- [2] It is necessary to have regard to the plaintiff's particulars of claim in order to properly understand the exception before me. At issue is the repayment of the sum of R28 162 409.50 which the plaintiff claims it had been paid to the defendants pursuant to the agreement which was unlawful, invalid and unconstitutional for reasons set out in the particulars of claim.
- [3] Briefly stated, the plaintiff avers that on 19 October 2015, the parties concluded an agreement for the provision of the tracking and recovery of ghost vending machines used to defraud the plaintiff of electricity and sales revenue, based on the success commission. The agreement was to endure for a period of three years. In terms of the price list, the payment of all the ghost machines was the sum of R50 000 000.00. At various occasions the plaintiff paid the defendants the sum of R28 162 409.50.
- [4] Amongst other allegations raised by the plaintiff in its particulars of claim is that, the conclusion of the agreement contravenes the provisions of section 217 of the Constitution and ESKOM's procurement as well as its supply chain

management procedure relating to sole and single source procurement in that the National Treasury approval was neither sought nor granted. In addition, the tender was not advertised on the National Treasury e-Tender portal, ESKOM's tender bulletin, or through local, national or international I – media as outlined in the ESKOM Procurement and Supply Chain Management Procedure.

- [5] The defendants' exception is directed at the allegations made at certain paragraphs of the particulars of claim, particularly the assertion relating to the liability of the defendants and the payments sought to be recovered from the defendants at paragraphs 8 and 9 thereof.
- [6] Consequently, the defendants contend that the plaintiff's particulars of claim lack the necessary averments to sustain a cause of action.
- [7] In *Vermeulen v Goose Valley Investments (Pty) Ltd*,¹ Marais JA stated as follows:

"It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it can be shown that ex facie the allegations made by the plaintiff and any other document upon which his cause of action may be based, the claim is (not may be) bad in law. . . ."

- [8] It cannot be overemphasized that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise.
- [9] In *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 913B-G it was explained thus:

¹ [2001] 3 All SA 350 (A) at para 7.

“...The Plaintiff is required to furnish an outline of its case. This does not mean that the Defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements”.

- [10] In **Frank v Premier Hangers CC** 2008 (3) SA 594 (C), Griesel J stated as follows at para [11] page 600:

“In order to succeed in its exception, the plaintiff [Excipient] has the onus to persuade the court that, upon every interpretation which the defendant’s [Respondent] plea and counter-claim [Particulars of Claim] can reasonably bear, no defence or cause of action is disclosed. Failing this, the exception ought not to be upheld.” [own insertion]

- [11] In this case, it is clear from the impugned particulars of claim that the plaintiff’s cause of action is based on the alleged conclusion of the agreement which culminated in the plaintiff paying the defendants the amount of R28 162 409.50. There is no doubt in my mind that the plaintiff wants the said amount to be repaid by the defendants. The particulars of claim together with the annexures fully flesh out the issues which gave rise to the claim. The allegations made by the defendants to the effect that the plaintiff needs to allege breach of the agreement cannot be sustained. The plaintiff’s claim in my view is properly particularised, and the defendants are aware, or reasonably ought to be aware of exactly which cause of action they are expected to meet.

- [12] Based on the above authorities and other legal principles, I hold that there is absolutely no merit in this exception that the particulars of claim lacks averments necessary to sustain a cause of action.

- [13] Having concluded that there is no merit in the defendants' exception, the only issue that remains to be determined is that of costs.

Costs

- [14] Counsel for the plaintiff urged this Court to grant costs on an attorney and client scale. She argued that the conduct of the defendants is a clear abuse of process, which the Court has a duty to eliminate in order to protect its dignity and processes, and I am inclined to agree.
- [15] In *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 8, Mogoeng CJ noted that “[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonesty, vexatious conduct and conduct that amounts to an abuse of court process.”
- [16] In *Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA and Others* (2016) 37 ILJ 2815 (LAC) at para 46, the Labour Appeal Court stated:

“The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”

- [17] It is my considered view that this application was brought *mala fide*, which has caused an unnecessary delay in finalising the matter, and therefore it is worthy of this Court's rebuke.
- [18] I therefore make the following order:

1. The application is dismissed.

2. The applicants/defendants/excipients to pay costs of this application on an attorney and client scale jointly and severally, the one paying the other to be absolved.



J Mnisi

Acting Judge of the High Court

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for hand-down is deemed to be 10h00 on 4 July 2024.

Counsel for the Excipients: Adv T. Mhlanga

Instructed by: Mohanoe Inc.

Counsel for the Respondent: Adv X. Hilita

Instructed by: Matamela Attorneys