

**REPUBLIC OF SOUTH AFRICA**



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

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|-----|----------------------------------------|
| (1) | <u>NOT</u> REPORTABLE                  |
| (2) | <u>NOT</u> OF INTEREST TO OTHER JUDGES |

**CASE NO:** 2023-120004

**DATE:** 11 OCTOBER 2024

In the matter between:

**KNOWN ASSOCIATES (PTY) LIMITED**

Plaintiff

and

**ASTRON ENERGY (PTY) LIMITED**

Defendant

**Coram:** Adams J

**Heard:** 8 October 2024 – ‘virtually’ as a videoconference on *Microsoft Teams*.

**Delivered:** 11 October 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 11 October 2024.

**Summary:** Civil procedure – exceptions to particulars of claim – claim based on successful tender – failure by plaintiff to plead terms of request for bids and tender – not clear from particulars of claim whether contract came into existence – second exception relates to claim based on infringement of intellectual property rights – infringements of intellectual property rights and unlawful competition –

defendant contends that particulars of claim do not disclose cause of action – it must be demonstrated that upon any construction of the particulars, no cause of action is disclosed –

First exception upheld – second exception dismissed.

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### **ORDER**

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- (1) The defendant's first exception to the plaintiff's particulars of claim 1 succeeds and is upheld.
- (2) The plaintiff is granted leave to amend its particulars of claim relating to Claim 1, if so advised, within twenty days from date of this order.
- (3) The defendant's second exception to the plaintiff's particulars of claim 2 fails and is dismissed.
- (4) Each party shall bear its own costs relating to the opposed Exception Application.

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### **JUDGMENT**

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#### **Adams J:**

[1]. The parties shall be referred to as referred to in the main action, in which the plaintiff ('Known Associates') claims against the defendant ('Astron Energy') monetary judgments apparently on the basis of contract and seemingly on the basis of intellectual property principles. I use the terms 'apparently' and 'seemingly' because, as will become clear later on in this judgment, the case on behalf of Known Associates is not pleaded and spelt out as clearly and as unequivocally as would normally be expected in court pleadings. In that regard, it is so that the particulars of plaintiff's claim are not a model of good pleading – far from it.

[2]. From about 2016 to about 2021, Known Associates and Astron Energy were in a contractual relationship, having entered into an oral agreement and thereafter a written agreement, and subsequent addenda to and amendments of such agreement. In terms of and pursuant to these agreements, Known Associates supplied material and rendered services to Astron Energy in the form of the provision of brand activations, promotional products, brand collateral and promotional prize fulfilment services, as well as further services to be rendered such as video shooting, video post-production, digital imaging retouches, creative sourcing and art direction production.

[3]. Disputes arose between the parties during or about 2021 and these disputes are the subject of the claims by Known Associates against Astron Energy in the main action. There are two claims by the plaintiff, and it may be apposite to cite in full the manner in which the plaintiff pleads its causes of action in respect of its two claims.

[4]. The first claim is pleaded, in the relevant part, as follows: -

**'Claim 1**

7.13 The plaintiff was the successful bidder in relation to a tender advertised by the defendant on 26 March 2020.

7.14 The new agreement was to commence in January 2021 and expire in December 2025 ("the 2021 agreement").

7.15 Despite the plaintiff being the successful bidder of tender, the defendant refused to prepare an agreement for the plaintiff to sign. As a result, the 2021 agreement never came into effect.

7.16 The plaintiff was able and ready to discharge its obligations under the 2021 agreement.

7.17 The contract amount in relation to the 2021 agreement was R20 million.

7.18 In the premises, the defendant is liable to the plaintiff in the amount claimed above.

WHEREFORE plaintiff prays for judgment as follows:

- (a) Payment of the sum of R20 million (twenty million rand).
- (b) Interest thereon at the prescribed legal rate *a temporae morae* from January 2021.
- (c) Costs on the scale as between attorney and client.
- (d) Further and/or alternative relief.'

[5]. The pleaded claim 2, in the relevant part, reads as follows: -

**'Claim 2**

- 7.19 On a number of occasions in 2019 and 2020, the plaintiff submitted proposals to the defendant for further services to be rendered.
- 7.20 For reasons not known to the plaintiff, the defendant declined the plaintiff's proposals, but awarded the same services to the plaintiff's competitors.
- 7.21 The plaintiff spent substantial time and resources creating and developing the ideas and concepts set out in the said proposals. The ideas and concepts the plaintiff proposed were unique. Accordingly, the plaintiff had a right to the intellectual property in the said ideas and concepts as detailed in the proposals.
- 7.22 The plaintiff raised the issue with the defendant on several occasions, and the defendant did not dispute the facts.
- 7.23 At paragraph 5 of the letter from the plaintiff to the defendant dated 15 July 2021 (annexure "KA4" to the amended plea), the plaintiff lists three specific instances that demonstrate that the defendant infringed on the plaintiff's right to the intellectual property to the ideas and concepts detailed in its proposals.
- 7.24 The value of the work the plaintiff would have invoiced the defendant had the defendant not awarded the services to the plaintiff's competitors in relation to
- 7.24.1 the bucket hats for Customer Service Attendants is R1 000 000 (one million rand);
  - 7.24.2 the CSAs to be awarded with Checkers food vouchers is R500 000 (five hundred thousand); and
  - 7.24.3 the car summer campaign is R3 000 000 (three million rand).
- 7.25 In the premises, the defendant is liable to the plaintiff in the amounts claimed above.
- WHEREFORE plaintiff prays for judgment as follows:
- (a) Payment of the sum of R1 000 000 (one million rand).
  - (b) Payment of the sum of R500 000 (five hundred thousand).
  - (c) Payment of the sum of R3 000 000 (three million rand).
  - (d) Interest thereon at the prescribed legal rate *a temporae morae* from date of summons.
  - (e) Costs on the scale as between attorney and client.
  - (f) Further and/or alternative relief.'

[6]. The defendant has raised two exceptions to the particulars of plaintiff's claims, alleging firstly that the particulars of the plaintiff's first claim do not disclose a cause of action. Secondly, the defendant alleges and contends that the particulars of the plaintiff's claim relating to claim 2 also lack averments which are necessary to sustain an action.

[7]. Before I consider the exceptions raised by the defendant and the grounds on which it is based, it is necessary to have a brief overview of the applicable general principles relating to exceptions. These general principles, as gleaned from the case law and conveniently summarised by this Court (per Meyer-Frawley J) in *Merb (Pty) Ltd v Matthews*<sup>1</sup>, can be summarised as follows.

[8]. In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action. The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

[9]. The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed. An excipient who alleges that a pleading does not disclose a cause of action or a defence, must establish that, upon any construction of the pleading, no cause of action or defence is disclosed.

[10]. An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit. Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained. Minor blemishes and insignificant embarrassments caused by a pleading can and should be cured by further particulars.

[11]. Having said the foregoing, however, exceptions are to be dealt with sensibly since they provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility and insofar as

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<sup>1</sup> *Merb (Pty) Ltd v Matthews* 2021 JDR 2889 (GJ).

interpretational issues may arise, the mere notional possibility that evidence of surrounding circumstances may influence the issue should not necessarily operate to debar the Court from deciding an issue on exception.

[12]. That then brings me back to the grounds on which the defendant based its exceptions.

[13]. The first ground of exception raised by the defendant relates to the allegation by the plaintiff that it (the plaintiff) was the successful bidder in relation to a tender which had been advertised by the defendant on 20 March 2020. The pleaded case then makes the quantum leap to a conclusion, without the exact term and conditions of the request for bids or of the tender itself being pleaded, that a contract ought to have come into existence. Moreover, the plaintiff then pleads that it is entitled to an amount of R20 million being in respect of the 'contract amount' of the contract which ought to have been concluded between the parties pursuant to the tender and its acceptance.

[14]. It is, as submitted by Mr Torrington, Counsel for the defendant, that there is a gaping hole and a complete disconnect between the allegation that the plaintiff's tender was accepted by the defendant and the conclusion that the plaintiff is entitled to payment of the envisaged contract price. The difficulty with the plaintiff's cause of action as pleaded in the particulars of claim is that it is not clear on what legal basis – whether contractual or delictual – the claim 1 is based. If in fact it is based on contract, then the particulars clearly lack the necessary averments in support of such a cause. One would, for example, have expected the particulars of plaintiff's claim to state, in no uncertain terms, that, if regard is had to the terms and condition of the request for bids and the tender itself, that a contract was concluded between the parties for the rendering of services and the supply of material. Such an allegation is nowhere to be found in the particulars of plaintiff's claim.

[15]. Moreover, if the terms and conditions of the request for bids and those of the tender itself translate into an agreement to enter into a contract, that

agreement, as we all know, is void *ab initio*, as being an unenforceable *pacta de contrahenda*. There is a further difficulty with the plaintiff's claim 1, as pleaded, and that relates to the fact the whilst damages of R20 million are claimed, the plaintiff failed miserably to properly quantify such alleged damages. It cannot possibly be that the whole anticipated contract price equates to the loss which the plaintiff suffered as a result of the alleged unlawful conduct on the part of the defendant.

[16]. The first ground of the defendant's exception accordingly should succeed. The simple point is that upon any construction of the plaintiff's particulars of the first claim, no cause of action is disclosed.

[17]. As regards the second exception directed against plaintiff's claim 2, it is the defendant's case that, if regard is had to the contractual relationship between the parties, which limited the defendant's liability and which also provided that any products, ideas and concepts produced pursuant to the agreements, would be the sole and exclusive property of the defendant, the plaintiff's pleaded case is excipiable. This contention is misguided. The case of the plaintiff places Claim 2 outside of the operation and the ambit of the contract between the parties. The plaintiff specifically pleads that its proposals were not accepted by the defendant and the services were accordingly not rendered pursuant to and in terms of the contractual arrangements between the parties. The contract accordingly does not find application as regard plaintiff's Claim 2.

[18]. The point to be made about the defendant's second ground of exception is simply that it is the case of the plaintiff, as pleaded by it, that the defendant has infringed upon its intellectual property rights by misappropriated its (plaintiff's) ideas, concepts and products. As a result of such infringement, the plaintiff has suffered damages, which it claims from the defendant in the main action. Whether that is factually correct or incorrect is of no moment. The pleaded case is a sustainable cause of action.

[19]. As alluded to above, in considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action. That, in my view, spells the end of this exception and the grounds on which it is based.

[20]. I interpose here to note that the quantification of the plaintiff's Claim 2 suffers from the same defect in claim 1 in that the damages, in my view, are not properly quantified. Moreover, the plaintiff's claim and its cause, which is clearly based on an infringement of intellectual property rights and/or unlawful competition and/or unlawful use of the plaintiff's confidential information, ideas and concepts, have not been pleaded as clearly and as unequivocally as is required in court pleadings. However, as I have already indicated, the particulars of claim relating to Claim 2 can and should be interpreted as disclosing a cause of action.

[21]. I am therefore of the view that there is no merit in the second exception and that the plaintiff's particulars of claim in that regard are not excipiable, the plaintiff's cause of action having been pleaded with sufficient particularity to disclose a cause of action. The simple point of the matter is that the defendant has failed to demonstrate that, upon any construction of the particulars of claim, no cause of action is disclosed.

[22]. The second exception therefore falls to be dismissed.

### **Costs**

[23]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*<sup>2</sup>.

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<sup>2</sup> *Myers v Abramson*, 1951(3) SA 438 (C) at 455;

[24]. In this matter the defendant has been successful in that its first exception relating to plaintiff's Claim 1 is upheld. Conversely, the plaintiff has had a measure of success in that it successfully resisted the defendant's second exception in relation to its second claim. These two parties, in my view, have had equal measure of success and it would be just to apply the foregoing general rule and to order each party to bear its own costs.

### **Order**

[25]. In the result, the order which I grant is as follows: -

- (1) The defendant's first exception to the plaintiff's particulars of claim 1 succeeds and is upheld.
- (2) The plaintiff is granted leave to amend its particulars of claim relating to Claim 1, if so advised, within twenty days from date of this order.
- (3) The defendant's second exception to the plaintiff's particulars of claim 2 fails and is dismissed.
- (4) Each party shall bear its own costs relating to the opposed Exception Application.



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**L R ADAMS**  
*Judge of the High Court*  
*Gauteng Division, Johannesburg*

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|--------------------|----------------------------------------------------|
| HEARD ON:          | 8 October 2024                                     |
| JUDGMENT DATE:     | 11 October 2024                                    |
| FOR THE PLAINTIFF: | N Nako                                             |
| INSTRUCTED BY:     | Straus Daly Incorporated, Sandton                  |
| FOR THE DEFENDANT: | P Torrington                                       |
| INSTRUCTED BY:     | Butler Blanckenberg Nielsen Safodien,<br>Cape Town |