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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: 4715/2020P

In the matter between:

STARSTRUCK TRADING CC t/a

DYNAMIC CONSTRUCTION AND DEVELOPMENTS

(CK 2000/03780/23)

PLAINTIFF

and

NICOLA JANE KÖHNE

FIRST DEFENDANT

LEON ROBERT KÖHNE

SECOND DEFENDANT

ORDER

The following order is granted:

1. The second defendant's exception is dismissed with costs, such costs to be in accordance with scale B.

JUDGMENT

E Bezuidenhout J

[1] The plaintiff issued summons against the two defendants for payment of the total amount of R907 265.82, framed as three separate claims, which emanated from re-building and renovation work done by the plaintiff at the defendants' home. The particulars of claim have already previously been amended.

[2] The plaintiff pleaded that an agreement was concluded between its representative, Mr O Dallaway, and the defendants on 21 February 2017, and proceeded to set out what it alleged were the material facts of the agreement.

[3] The plaintiff pleaded further as follows:

'4A.1. On 21 February 2017 Oliver Dallaway, representing the Plaintiff sent the Defendant an email at 08h34, a copy of which is "B1".

4A.2. Oliver Dallaway, representing the Plaintiff, had a conversation with the Defendants during 21 February 2017, during which conversation the parties reached agreement on the material terms set out in paragraph 4 below.

4A.3. On 21 February 2017, after the aforesaid conversation and at approximately 20h32, Oliver Dallaway representing the Plaintiff sent the Defendants an email, a copy of which is "B2".

4A.4. These are the legal conclusions that the Plaintiff contends flow from these material facts:

4A4.1.the agreement concluded between the Plaintiff and the Defendants should be classified either as an oral agreement or as a partly oral and partly written agreement;

4A.4.2. if it is classified as an oral agreement, then annexure "B1" forms part of the context in which the agreement was concluded and annexure "B2" constitutes evidence of its terms; alternatively

4A.4.3. if it is classified as partly oral and partly written then the identified paragraphs of "B1" and/or "B2" below constitute the written portion of the agreement.'

[4] Annexure 'B1' is an email dated 21 February 2017, sent by Mr Dallaway to the second defendant, setting out certain points to be discussed at a meeting, which included, inter alia, building costs and monthly fees.

[5] Annexure B2 is another email from Mr Dallaway, sent to both defendants on 21 February 2017, after the meeting had taken place, 'just to confirm a few things'. At least 18 items are listed, which clearly relate to the issues discussed in respect of the construction.

[6] The plaintiff pleaded in para 4 that the plaintiff and defendants were parties to a binding agreement, regardless of whether it should be classified as oral or as partly written and partly oral. The plaintiff pleaded further as follows:

'4.1 The Plaintiff would perform certain renovations and rebuilding to the Defendants' residence at F[...], D[...] A[...], KwaZulu-Natal. The Plaintiff would carry out such renovations and rebuilding in accordance with instructions received from the Defendants from time to time. The Defendants would pay the Plaintiff the costs incurred by it in procuring the materials, labour and specialist workmanship necessary to execute the renovations and rebuilding ("the building costs"). This term was agreed orally. It is referred to and confirmed at paragraph 1, 3, 4, 5 and 7 of B1 and paragraphs 1, 9 and 11 of B2.

4.2 The estimate price for the building costs at inception of the contract, excluding the project management fee would be the sum of R3 954 705.06 in accordance with the attached annexure "A1-A4", subject to any agreed variations;

4.3 The Defendants would pay to the Plaintiff the sum of R400 000.00 on or before the 5th March 2017 and such further amounts as the Plaintiff may require and request from time to time for the performance of its obligations. This was agreed orally and recorded in paragraph 15 of B2;

4.4 The agreed price would include a monthly supervision fee of R50 000.00 for the plaintiff. This was agreed orally.

4.5 The Plaintiff would, in addition, be paid a project management fee upon completion or termination of the contract in an amount agreed upon between the parties

alternatively in a reasonable amount in accordance with industry norms, being between 10 and 20% of the building costs. This was agreed orally.

4.6 The Defendants would vouch for all costs related to the building works as set out and discussed in the various annexures hereto, including the costs of storing any materials. It was a tacit term of the agreement that the first and second Defendants were jointly and severally liable to the Plaintiff to pay the agreed amounts.'

[7] Annexures 'A1' to 'A4' were schedules of itemised items, provisional costings variations and comments or notes.

[8] The second defendant's exception is mainly directed at the aforementioned paragraphs of the particulars of claim, which, it is alleged, are vague and embarrassing.

[9] The second defendant states that the plaintiff's cause of action is based on a binding agreement, as pleaded in para 4 of the particulars of claim. The plaintiff does not identify whether the agreement was oral, or oral alternatively written. Instead, the plaintiff refers to the exchange of the two emails, annexures 'B1' and 'B2', as well as a conversation during which the parties allegedly reached an agreement on the terms pleaded in para 4 of the particulars of claim.

[10] The second defendant further states that in para 4A.4, the plaintiff pleaded that the agreement pleaded in para 4 and which agreement was concluded during the conversation on 21 February 2017, must as a matter of law be classified as an oral agreement or as a partly oral and partly written agreement.

[11] The second defendant complains that the assertions as to the nature of the agreement and the terms thereof, and in particular whether they are written, oral, or partly written and partly oral, are contradictory in that:

(a) In para 4A.2, the entire agreement is alleged to have been concluded 'during a conversation'.

(b) The emails, annexures 'B1' and 'B2', are not alleged to form part of the written agreement, only possibly to be 'classified as such'.

(c) The fact that the two emails exist alongside the conversation, is alleged to lead to the legal conclusion that the agreement must be classified as either oral, or partly oral and partly written, in which event the emails are to constitute the written portions of the agreement.

[12] The second defendant also stated that in paras 4.1, 4.3, 4.4 and 4.5, all the material terms are alleged to have been concluded orally and not orally or alternatively partly written and partly oral.

[13] The second defendant concluded by stating that it was impossible to establish from the particulars of claim whether the plaintiff relies on an oral agreement, or a partly oral and partly written agreement, which terms were oral and written.

[14] Much has been said about a court's approach to exceptions. In *Merb (Pty) Ltd v Matthews*,¹ the general principles were summarised, and the following was held:

'Where an exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed. It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (*facta probanda*). The *facta probanda* necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence which is necessary to prove each fact (being the *facta probantia*) but every fact which is necessary to be proved.' (Footnotes omitted.)

[15] According to *Erasmus*,² the exception that a pleading is vague and embarrassing 'is intended to cover the case where, although a cause of action appears in the summons there is some defect or incompleteness in the manner in which it is set out, which results in embarrassment to the defendant. An exception that a pleading is vague

¹ *Merb (Pty) Ltd and others v Matthews and others* [2021] ZAGPJHC 693 para 13.

² D E van Loggerenberg *Erasmus: Superior Court Practice* (RS 23, 2024) at D1 Rule 23-11 ('*Erasmus*').

and embarrassing strikes at the formulation of the cause of action and not its legal validity.’ (Footnotes omitted.)

[16] *Erasmus* sums up the applicable test in deciding exceptions based on vagueness and embarrassment as follows:³

‘(a) In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. If a statement is vague it is either meaningless or capable of more than one meaning. To put it at its simplest: the reader must be unable to distil from the statement a clear, single meaning.

(b) If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of.

(c) In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.

(d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.

(e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

(f) The excipient must make out his case for embarrassment by reference to the pleadings alone.

(g) The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness.’ (Footnotes omitted.)

[17] Counsel for the second defendant, Mr Stokes SC, referred to the provisions of Uniform rule 18(4) in terms of which every pleading ‘shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim ... with sufficient particularity to enable the opposite party to reply thereto’.

³ Ibid at D1 Rule 23-13 to 14.

[18] Mr Stokes also referred to *Erasmus*⁴ where reference was made to *Maharaj's Coach and Bus Hire CC v Dealership Middelburg Man (Pty) Ltd*,⁵ where Koen J found it regrettable that the plaintiff's allegations were not helpful in identifying the crisp issues in dispute and stated:

'It is regrettable that the allegations in the plaintiff's declaration were not helpful in crisply identifying the true issues in dispute between the parties. The rules regarding pleadings and practice require that the plaintiff's case be pleaded in separate distinct averments setting out in clear concise statements the material facts upon which it relies for the relief claimed. Instead, the declaration reads in places like extracts from the affidavits in the application, which it was conceded during argument to be. The declaration followed a narrative form, with reference to various annexures annexed thereto, which were invariably referred to with the injunction that "the contents of [the particular annexure] be incorporated herein as though specifically averred to." That is contrary to accepted practice. It is not expected of a court, even in application proceedings, to have to trawl through annexures to try and determine which portions of the annexures are relevant, and to identify the possible *facta probanda*.' (Footnotes omitted.)

[19] Mr Stokes submitted that there was a clear disconnect between the facts pleaded and the conclusions sought to be drawn. With reference to para 4A.4, it was submitted that it was furthermore confusing to have to plead to 'legal conclusions'. It was also submitted that no facts in respect of a written agreement were pleaded and furthermore that no particular terms were pleaded. It was submitted that absent a factual allegation of the conclusion of a written, or partly written agreement, the second defendant is unable to establish on what basis the agreement should, as a matter of law, be classified either as an oral agreement or as a partly oral and partly written agreement. This makes the particulars of claim vague and embarrassing.

⁴ Ibid at D1 Rule 18-8.

⁵ *Maharaj's Coach and Bus Hire CC v Dealership Middelburg Man (Pty) Ltd and others* [2022] ZAKZPHC 34 para 15.

[20] Counsel for the plaintiff, Mr Lamplough SC, submitted that it is clear from the particulars of claim that the parties concluded an agreement on a very informal basis. In respect of the second defendant's complaint regarding the legal conclusions to be drawn, it was submitted that it is not possible for the plaintiff to draw an absolute distinction between facts and conclusions, as it is difficult to distinguish between the two. It was further submitted that there is, however, no obstacle to plead, as what is contained in the particulars is clear to understand: the plaintiff's representative sent an email containing certain proposed terms; on the same day, he attended a face-to-face meeting with the defendants; and that evening sent a confirmatory email recording certain contractual terms or arrangements.

[21] It was further submitted on behalf of the plaintiff that it is not always easy to categorise an agreement as either oral or partly written and partly oral. It was also submitted that the plaintiff's principal case is that the agreement was concluded orally but that the two emails were also sent on the same day containing certain terms. These emails are relevant because they provide context and were written contemporaneously. It was submitted that the question underlying the exception is whether the emails should be considered as the written portion of the partly written and partly oral agreement or whether they were simply contemporaneous notes or an *aide-memoire*.

[22] Mr Lamplough referred to *Christie's Law of Contract*⁶ where the following was stated:

'The terms of the contract are the promises agreed on by the parties that together make up the contract. When there is doubt or dispute about what statements, oral or written, or conduct should be included in the contract as terms a court may have to carry out a two-stage inquiry to decide first, what was said, written or done and second, whether it must be included among the terms of the contract.'

It was submitted that the court hearing the matter will have to undertake this enquiry but in the meantime, the plaintiff, by including and referring to annexures 'B1' and 'B2', has provided material which would be relevant at the trial. It was also submitted that in light

⁶ G B Bradfield *Christie's Law of Contract* 8 ed (2022) at 193-194 ('*Christie's*).

of the plaintiff's difficulty in classifying the agreement, it pleaded that on the particular facts, the agreement should be labelled as either an oral agreement or a partly written and partly oral agreement.

[23] It was further submitted by Mr Lamplough that the second defendant is required to establish either vagueness, embarrassment, or prejudice, which he has failed to do, because the allegations that the defendants are called upon to answer are clear. It was submitted that the second defendant has failed to point to any vagueness or embarrassment, as there is none. It was submitted that if the defendants wished to plead that the agreement could only be an oral agreement and not a partly written and partly oral agreement, they were free to do so, as the point is immaterial and will have no bearing on the outcome of the case. It was submitted that the exception should accordingly be dismissed with costs.

[24] I am not convinced that the second defendant has demonstrated vagueness amounting to embarrassment and embarrassment amounting to prejudice. The second defendant clearly has a difficulty with the label to be attached to the agreement. I agree with the submissions by Mr Lamplough that there are no obstacles to plead to the particulars of claim, as the facts are clear and that it is the label in respect of the type of agreement that is posing a difficulty for the plaintiff, and the defendants, for that matter. The particulars of claim are framed in an unusual way (Mr Lamplough was quick to point out that he was not the draughtsman) but as pointed out in *Christie's*, the court will determine the terms of the agreement in due course. In the meantime, there are sufficient allegations to enable the defendants to plead. I am of the view that it has not been shown that there is some defect or incompleteness. The plaintiff has, on the contrary, included the emails as additional information which will assist the parties and the court in due course to determine the exact terms of the agreement. I am accordingly of the view that the exception must fail. No submissions were made on the question of costs or the scale thereof. In my view there is no reason to deviate from the general rule that costs should follow the result. As far as the scale is concerned, I am of the view that the appropriate scale would be scale B.

[25] I grant the following order:

1. The second defendant's exception is dismissed with costs, such costs to be in accordance with scale B.

E BEZUIDENHOUT J

Date of hearing: 4 June 2024

Date of judgment: 29 August 2024

Appearances:

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