IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable/Not reportable

Case number: 6120/2023

In the matter between:

MAXIMUM PROFIT RECOVERY (PTY) LTD	**PLAINTIFF/ RESPONDENT**
and	
VAAL CENTRAL WATER BOARD	**DEFENDANT/ EXCIPIENT**

Coram: Loubser J
Heard: 26 July 2024
Delivered: 13 November 2024

Summary: Exception by Defendant against Plaintiff's particulars of claim – whether cause of action disclosed

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ORDER

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1. The exception is dismissed with costs on the party and party scale, including the costs of counsel on scale C.

JUDGMENT

LOUBSER J

[1] The Plaintiff in this matter issued summons against the Defendant for payment of

the amount of R14 507 168.30 plus interest and costs on the scale as between attorney and own client. The claim is founded upon a written service level agreement concluded by the parties on 9 April 2021 at Pretoria, alternatively at Bothaville. The Defendant noted an exception to the Plaintiff's particulars of claim on the grounds that it failed to disclose a cause of action and/or is vague and embarrassing. The exception was argued before this Court by counsel representing the parties, and this is the Court's judgment on the exception in question.

[2] From the onset it needs mentioning that the Defendant failed to give notice to the Plaintiff in terms of Rule 23(1)(*a*) as far as the aspect of a vague and embarrassing pleadings is concerned. The subrule provides as follows: '(a) Where a party intends to take an exception that a pleading is vague and embarrassing, such party shall, by written notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice." This has not been done by the Defendant, and therefore the question whether the pleading is vague and embarrassing, is not properly before the Court. As a result, only the question whether the particulars of claim disclose a cause of action, needs to be determined.

[3] In the particulars of claim reference is made to a copy of the service level agreement, which is annexed thereto. This agreement was entered into by the Plaintiff and Sedibeng Water, the predecessor of the Defendant in its contractual relationship with the Plaintiff. This came about by the publication of a government gazette which transferred the Free State area from Sedibeng Water to the Defendant. The Plaintiff alleges in the particulars of claim that Sedibeng Water failed to provide the Plaintiff with a copy of the signed service level agreement which was duly signed by its authorised representative, S. Dzengwa.

[4] The Plaintiff went on to plead that in the event of a finding that Dzengwa failed to sign the agreement, then Sedibeng has accepted the agreement by its conduct. It is pleaded that Plaintiff provided Sedibeng with a draft agreement. Sedibeng then revised the agreement and emailed it back to the Plaintiff. The Plaintiff signed the revised agreement, and provided Sedibeng with a copy of the agreement, as signed by the Plaintiff, on 9 April 2021. Subsequent to that date, both the Plaintiff and Sedibeng Water implemented the service level agreement.

[5] The exception filed is based on two grounds. The first ground is aimed at the allegations referred to in the two preceding paragraphs. It is stated in the exception that the Plaintiff is relying on an annexed written agreement which is not signed by the

Defendant. The Defendant further points out that the Plaintiff also rely on the tacit acceptance of the agreement on 9 April 2023 after the Plaintiff had signed the agreement and emailed a copy thereof to the Defendant. According to the Defendant, there are contradictory averments which fail to disclose a cause of action, because the agreement provides in clause [1.5] that the agreement shall commence on the date of signature thereof.

[6] In *The Trustees for the time being of the Children's Resources Centre Trust and Other v Pioneer Food (Pty) Ltd and Others*[1] the Supreme Court of Appeal stated that the test on exception is whether on all possible readings of the facts no cause of action is made out. It is for the defendant to satisfy the court that the conclusion of law for which the plaintiff contends, cannot be supported upon every interpretation that can be put upon the facts.

[7] In applying this principle, this Court is mindful of the fact that the Plaintiff made the express averment in its pleading that the agreement was duly signed on behalf of Sedibeng by S. Dzengwa. In this respect, the Plaintiff will be entitled to call that person at the trial to testify. In addition, the Plaintiff may require the Defendant to make discovery at the close of pleadings, which may result in the discovery of a fully signed agreement. Presently, the Plaintiff relies on its averment in the particulars of claim that the Defendant had failed so far to provide it with a copy of the fully signed agreement. In addition, the Plaintiff made allegations in the pleading that the Defendant at the very least gave its consent to the agreement tacitly, and subsequently implemented the agreement. On the basis of these allegations, the Plaintiff will be entitled to present evidence at the trial to prove same.

[8] In this respect I find the remarks of Harms JA (as he then was) in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*[2] apposite: "Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility.....the response to an exception should be like a sword that cuts through the tissue of which the exception is compounded and exposes its vulnerability".

[9] In the present matter, a sensible approach shows that the Plaintiff has made sufficient averments to enable it to present a case at the trial. I am unable to find that the Plaintiff has not displayed a case with legal merit in its particulars of claim. Consequently, the first ground of the exception stands to fail.

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[1] 1 All SA 648 at para 36
[2] 2006 (1) SA 461 (SCA) at 465

[10] In the second ground of the exception, it is contended that the Plaintiff had failed to make the necessary allegations to claim payment from the Defendant. The contention is that the Plaintiff asserts in the particulars of claim that the liability of the Defendant towards clients and the South African Revenue Service had been reduced by millions of Rands due to a report that the Plaintiff had prepared in terms of the agreement. The Plaintiff thus alleges that a financial benefit was obtained by the Defendant, and that it is entitled to claim 8% of that financial benefit, which 8% represents the amount claimed. Since the particulars of claim and the agreement expressly records that payment would only be due and owing to the Plaintiff upon receipt by the Defendant of the financial benefit, it was never pleaded by the Plaintiff that the Defendant had actually received a financial benefit following the report of the Plaintiff, it is submitted. In the absence of such an averment, the Plaintiff has failed to plead a necessary element to establish a cause of action, the Defendant says.

[11] However, clause 3.1 of the agreement provides that, should MaxProf (the Plaintiff) not be able to identify any financial benefit for the Defendant, then MaxProf shall not be entitled to any fee in respect of the review. Clause 3.2 provides that the Defendant shall pay MaxProf 8% of the financial benefit identified for the Defendant. Upon a proper interpretation of the wording of these two clauses, it is the identification of a financial benefit by the Plaintiff that would entitle it to payment by the Defendant.

[12] On the other hand, as contended by the Defendant, clause 3.4.1 states that payment is due and owing to MaxProf by the Defendant upon receipt of the financial benefit from the Defendant's suppliers and/or SARS. As a result, it appears as if the term 'financial benefit' cannot be finally interpreted at the exception stage. What is clear, though, is that the saving identified by the Plaintiff in its report, relates to a saving in respect of its VAT liability. In my view, the trial court will be in a better position to interpret the term 'financial benefit' finally after discovery has taken place and after hearing the evidence presented. For the moment, there can be no doubt that the Plaintiff's reliance on clause 3.1 and 3.2 of the agreement in its particulars of claim to the effect that Plaintiff had obtained a financial benefit for the Defendant for which it is entitled to payment, appears to be justified. It follows that also the second ground of the exception cannot succeed.

[13] The following order is made:

1. The exception is dismissed with costs on the party and party scale, including the costs of counsel on scale C.

[redacted]

P.J. LOUBSER, J

Appearances

For the Defendant/Excipient:	Adv. A.E. Ayayee
Instructed by:	Moroka Attorneys, Bloemfontein
For the Plaintiff/ Respondent:	Adv. A.P.J. Els SC
Instructed by:	Albert Hibbert Attorneys Inc, Pretoria c/o Webbers Attorneys Inc, Bloemfontein