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

Case No: **110609/2023**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 06 FEBRUARY 2025

SIGNATURE

In the matter between:

RUTEGA EDUCATION SERVICES CC (SOUTH AFRICA) Excipient /Defendant

and

OPTIMAL STUDENT RECRUITMENT (PTY) LTD Plaintiff

In re:

OPTIMAL STUDENT RECRUITMENT (PTY) LTD Plaintiff

and

RUTEGA EDUCATION SERVICES CC (SOUTH AFRICA) Defendant

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for handing down is deemed to be 06 February 2025.

JUDGMENT

INTRODUCTION

[1] The defendant, Rutega Education Services CC (South Africa) [the excipient] takes exception to the plaintiff's particulars of claim on two grounds in terms of Uniform Rule 23 namely that, the plaintiff's particulars of claim fail to disclose a cause of action and that its particulars of claim are vague and embarrassing. This exception is opposed.

[2] On the date of the hearing and after much deliberation in oral argument, both Counsel were finally *ad idem* that the only ground to be determined by this Court was the first ground. The first ground raises a complaint as against this Court's jurisdiction to entertain the action and, in consequence that no cause of action has been established on the pleadings. A sensible agreement on exception as, this complaint may serve the intended purpose of an exception namely, to curtail unnecessary and further litigation. If not, the plaintiff has been forewarned. It is then on this basis, that the Court only deals with the veracity of the first ground and, in so doing, considers the ground as against the plaintiff's particulars of claim [jurisdictional challenge].

THE PARTICULARS OF CLAIM

[3] The plaintiff is a *peregrinus* who instituted an enrichment claim against the excipient an *incola*, for an amount of AUD \$52,493.96 (ostensibly an amount of R646,237.39 as date of the institution of the action) [claimed amount] which it alleges that the excipient retains without justification, at its expense.

[4] The jurisdictional fact relied on by the plaintiff on the pleadings is that the excipient's registered address, which is situated within the jurisdiction of this Court, namely 7[...] H[...] Avenue, Faerie Glen, Pretoria. An accepted allegation on the face of it on exception. This Court in consequence, in terms of section 21(1) of the

Superior Courts Act¹ possesses the requisite jurisdiction. However, this, jurisdictional fact, according to the excipient is not the end of the jurisdictional enquiry.

[5] To commence the enquiry, it is noted that the allegations in plaintiff's particulars of claim are clearly set out and dealt with under headings. In this way, the relevant background facts are set out to demonstrate the Plaintiff's justification of the claimed amount. Such justification explained with reference to an agreement.

[6] To contextualise this justification is to deal with the pleaded background facts which then gives rise to its enrichment claim against the excipient:

- 6.1. The plaintiff and the excipient entered into a joint venture agreement on the 22 June 2022 at Pretoria, alternatively in Western Australia [the agreement].
- 6.2. At the time of the conclusion of the agreement, a joint venture company, Ruteqa Education Services Limited (Kenya) [the company] had already been established. In terms of the agreement, the plaintiff was tasked with the day-to-day functions of the company. For such services the plaintiff was entitled to receive remuneration.
- 6.3. The remuneration, in this case the claimed amount was payable by the company for the services rendered to it by the plaintiff. Payment to be made within 30 days of presentation of an invoice.
- 6.4. The plaintiff pleads that its performance in terms of the agreement.
- 6.5. It was a condition precedent of the agreement that the excipient was to open one or more separate bank accounts in the name company by 6:00pm on the 30 June 2022. Relying on such condition

¹ Act 10 of 2013, as amended.

precedent, the plaintiff at paragraph 9.6 of the particulars of claim pleaded that:

9.6 Upon the conditions precedent and pleaded above, not being satisfied by 6:00pm on the 30 June 2022, the parties agreed that the agreement would cease to have effect immediately after that time on that date, except for [clause 5.5].

- 6.6. Clause 5.5 lists the clauses that would survive such cessation of the agreement. Although not all these clauses are pleaded, the plaintiff pleads the relevant clause which it relies on, clause 5.5.13. Clause 5.5.13 deals with the survival of “*any rights, remedy, obligations or liabilities that have accrued under this agreement.*”
- 6.7. The excipient did not fulfil the condition precedent. In consequence, save for the surviving clauses, the agreement ceased to have an effect.
- 6.8. The plaintiff rendered services for the company, tendered invoices which remain unpaid and as a result, the company became indebted to it.

THE JURISDICTIONAL CHALLENGE

[7] After the background facts establishing the plaintiff's right and the company's liability to pay the claimed amount, the plaintiff in its particulars of claim deals with the basis for its enrichment claim against the excipient. In short, the plaintiff alleges the excipient received payment of company income from third parties and deposit it in its bank account. This was done without justification, and the excipient has failed to pay it the plaintiff the claimed amount on the company's behalf.

[8] The thrust of the excipient's argument lies at paragraph 11 of the particulars of claim where the plaintiff alleges that:

“The agreement however stipulates that certain terms thereof would survive, should the agreement not come to force in terms of clause 5.5, the contents of the clause bearing relevance to this action (own emphasis) to this action being the stipulation that any rights, remedies, obligations or liabilities that have accrued under the agreement, would be enforceable.”

[9] Paragraph 11 is clearly pleaded under the heading “RELEVANT FACTUAL BACKGROUND” sub-heading “JOINT VENTURE AGREEMENT”

[10] The relevance of such background facts appeared to have escaped the excipient who now, argues that the plaintiff’s reliance of clause 5.5.13 translates into the plaintiff pleading that its enrichment claim is brought in terms of the agreement.

[11] In this way, and moving from this premise, the excipient on exception relies on clause 41 of the agreement. Clause 41, in terms of clause 5.5 survives the unfulfilled condition precedent. Clause 41 states that:

“GOVERNING LAW AND JURISDICTION

41.1 *This agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the laws of Kenya.*

41.2 *Each party irrevocably agrees that the courts of Kenya shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with the agreement or its subject matter or formation.”*

[12] Relying on clause 41, the excipient *inter alia*, argues that the enrichment claim is governed by the application of Kenyan law principles and is too, to be heard in Kenya. This is the basis of the jurisdictional challenge.

DISCUSSION

[13] The excipient is bound to its exception. Moving from that premise, and reading the particulars of claim as a whole, paragraph 11, under the heading “*RELEVANT FACTUAL BACKGROUND*” is simply that, background facts from which the plaintiff’s accrued right in terms of the agreement to the claimed amount as against the company is established and explained, nothing more than that. In other words, a basis for its claim against the company in terms of the surviving clauses of the agreement. No exception lies against the justification of the claim against the company.

[14] Furthermore, none of the clauses which have survived the agreement, as pleaded, create any *ex contractu* obligation between the plaintiff and the excipient which the plaintiff can or does rely on.

[15] Paragraph 11 therefore refers to the plaintiff’s right to claim its remuneration from the company which right accrued under the agreement and therefore it “- *bears relevance to the action*” and was pleaded.

[16] The plaintiff sets its enrichment claim under a separate heading and bases its claim against the excipient on its own conduct. The excipient’s conduct to justifiably hold company funds falls outside the purview of the surviving clauses referred to in 5.5 of the agreement. As such, clause 41 does not provide the protection relied on by the excipient.²

[17] Culminated with the above reasoning is to consider the well settled fact that a foreign jurisdiction clause, like clause 41, does not automatically exclude a Court’s jurisdiction. In this matter a *ratio jurisdictionis* was pleaded for a Court to entertain the matter. The plaintiff’s registered office is in the Court’s jurisdiction,

² ***Foize Africa (Pty) Ltd v Foize Beheer BV and Others*** [2012] ZASCA 123; [2012] 4 All SA 387 (SCA); 2013 (3) SA 91 (SCA) at [13], ***Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwane (Pty) Ltd*** 1981 (2) SA 173 (T).

which on exception is accepted as a fact. This Court, as the pleadings stand, and at this stage, can entertain the action as instituted³.

[18] Lastly, there is a practical reason why a litigant would rather raise a jurisdictional challenge by way of special plea instead by way of exception. The practical answer is that at the special plea stage, a litigant attracts an onus, a replication can be filed, and a Court can consider evidence, if lead. In this way, the veracity of allegations can be weighed and tested. This is not the case on exception. Be that as it may, the excipient procedurally was not precluded from raising its jurisdictional challenge by way of exception however, it did so unsuccessfully.

[19] Ground one then fails, and the exception as raised is to be dismissed. There is no reason why costs should not follow the result in the absence of argument to the contrary to consider.

The following order:

1. The exception is dismissed with costs on Scale B.

L.A. RETIEF

Judge of the High Court
Gauteng Division

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