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

Not reportable

Case no: 4208/2024

In the matter between

MODISE MODISE LEGAL PRACTITIONERS t/a
MODISE MODISE ATTORNEYS Plaintiff

and

THE MANGAUNG METROPOLITAN MUNICIPALITY Defendant

Coram: Ntanga AJ
Heard: 21 February 2025
Delivered: 24 March 2025

Summary: Civil procedure – exception by the defendant against plaintiff's particulars of claim – whether necessary averments are made to sustain a cause of action – offer relied upon not accepted by plaintiff in accordance with the mode stipulated by defendant - exception upheld.

ORDER

1. The exception is upheld.
2. The plaintiff is granted leave to amend its pleadings within twenty (20) court days of this order, failing which, leave is granted to the defendant to apply for the dismissal of the claim.
3. The plaintiff to pay costs on a party-to-party scale, including costs of counsel on scale B.

JUDGMENT

Ntanga AJ

Introduction

[1] In this matter, the plaintiff caused summons to be issued against the defendant for payment of the sum R802 928.00 plus interest at the rate of 9% per annum and costs of suit. The plaintiff's claim arises from letters of appointment in terms whereof the plaintiff is appointed to represent the defendant in four court proceedings between the defendant and four different plaintiffs. These matters are: (i) the defendant and Cobra Towing CC with case number 5264/2024; (ii) the defendant and Mbongo Wildlife Ranch CC with case number 2411/2020; (iii) the defendant and Seqhobong Construction CC with case number 5353/2022; and the defendant and The Body Corporate of the Hydromed Sectional Title Scheme.

[2] The Mangaung Metropolitan Municipality (the excipient) noted an exception to the plaintiff's particulars of claim on the ground that the plaintiff's particulars of claim lack averments which are necessary to sustain an action and/or a cause of action against the defendant.

The exception and applicable law

[3] The defendant's grounds for exception are:

a) The plaintiff's purported claims are *inter alia* on the averment that the defendant issued the plaintiff with various letters of appointment in various matters, appointing the plaintiff as attorney to represent the defendant in various proceedings.

b) All four of the letters of appointment respectively appended to the plaintiff's particulars of claim, state and record as requirement, that the recipient of the letter of appointment, not to only acknowledge receipt of such letter of appointment in writing, but more importantly, confirms acceptance of the said instruction stated and contained in annexures 'MM1' to 'MM4' to the plaintiff's particulars of claim in writing.

c) The plaintiff's particulars of claim contain no averment or allegations that the plaintiff has, as required and stipulated in the various letters of appointment, accepted such appointment(s) which was clearly stated and set as a condition (suspensive) to such appointment and/or contract of appointment.

d) The plaintiff's particulars of claim contain no averment that the plaintiff and/or its directors and/or its employees, are duly admitted and enrolled to practice as legal practitioners in terms of *inter alia*, ss 24, 30, 33 and 35 of the Legal Practice Act 28 of 2014 and are therefore entitled to render bills of costs, payment of which is claimed in the present action.

[4] Rule 23 of the of the Uniform Rules of this court provides that:

'(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto . . . Provided that –

(a) Where a party intends to take an exception that a pleading is vague and embarrassing, such party shall, by 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; and

(b) The party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph *(a)* is received, or within 15 days from which such reply is due, deliver the exception.

(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter, and may set such application down for hearing within five days of expiry of the time limit for the delivery of an answering affidavit or, if an answering

affidavit is delivered, within five days after the delivery of a replying affidavit, referred to in rule 6(5)*(f)*: Provided that –

(a) the party intending to make an application to strike out shall, by notice delivered within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove cause of complaint within 15 days of delivery of the notice of intention to strike out; and

(b) The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted.

. . .'[1]

[5] The excipient did not file a notice in terms of rule 23(1)*(a)* and 23(1)*(b)* and, as Loubser J stated in *Maximum Profit Recovery (Pty) Ltd v Vaal Central Water Board*[2] that in the absence of this notice, the question whether the pleading is vague and embarrassing, is not properly before court. In any event, the defendant's notice of exception did not complain that the plaintiff's particulars of claim are vague and embarrassing. There is no requirement for the excipient to file the notices set out in rule 23(1)*(a)* and *(b)*.[3] This Court will only determine whether the plaintiff's particulars of claim lack necessary averments to sustain its cause of action.

[6] The plaintiff pleaded that it complied with and/or performed its obligations and/or duties in terms of and in accordance with the terms and provisions of the letters of appointment by rendering legal services to the defendant in all matters referred to in the letters of appointment. The plaintiff argued that failure to comply with the formality stipulated in the letters of appointment does not render the agreement void or unenforceable. Its performance of the legal services and the defendant's acceptance of those services sufficiently establish a contractual relationship.

[7] The plaintiff further argued that its particulars of claim plead existence of an agreement, performance by the plaintiff and non-payment by the defendant. In so doing, the plaintiff argued that it has made essential averments required to sustain a cause of action for breach of contract. The plaintiff further argued that the totality of the pleadings indicates a proper contract between the plaintiff and the defendant. The

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[1] DE Van Loggerenberg *Erasmus: Superior Court Practice* (2).
[2] *Maximum Profit Recovery (Pty) Ltd v Vaal Central Water Board* [2024] ZAFSFC 362.
[3] Footnote 1 at D1-310C.

plaintiff argued that the requirement for it to confirm acceptance of the instruction in writing does not constitute a suspensive condition but rather an administrative formality to confirm communication and acceptance of the instruction.

. [8] The defendant argued that the mere fact that the plaintiff rendered services does not mean that there is an existing contract. Plaintiff could have proceeded with undue enrichment. Defendant further argued that if the offeror prescribes the method of acceptance, that must be complied with. In *Lepogo Construction (Pty) Ltd v Govan Mbeki Municipality*[4] (*Lepogo Construction*) the Supreme Court of Appeal stated that:

'It is undisputed that the form of offer and acceptance had not been completed by the parties. It is the completion of that form, according to clause 3.13, that constitutes the formation of a contract between the Municipality and the successful tenderer. And in terms of clause 3.16, the agreement only comes into effect on the date when the tenderer receives a fully completed version of the contract document. Even then, according to clause 3.16, a contractor has five days after the signing and issuance of the final version of the contract document by the Municipality to notify the Municipality of his non-acceptance of the contents of the agreement. Only, thereafter, in the words of clause 3.16, does a "binding contract" come into existence between the parties. Thus, what clause 3.13 does is to stipulate the procedure to be followed for the conclusion of an agreement and clause 3.16 goes further in stipulating when a binding contract comes into existence.'[5]

In concurring with Ponnan JA's judgment in *Lepogo Construction (Pty) Ltd v Govan Mbeki Municipality*, Pillay JA succinctly sets out the legal principle and stated that: '". . . a binding contract is as a rule constituted by acceptance of an offer." The offer and acceptance are two of the fundamental formalities required to establish a binding contract.'[6]

The learned judge continued:

'It is trite that where, in a proposed contract, the mode of acceptance is stipulated, it is that mode that must be followed before a contract is concluded. In *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) 555 (A) it was stated that an offeror may always prescribe the mode of acceptance of his offer in order that a *vinculum juris* should be created. In *Driftwood Properties (Pty) Ltd v Maclean* 1971 (3) SA 591 (A) at 597D it was

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[4] *Lepogo Construction (Pty) Ltd v Govan Mbeki Municipality* [2014] ZASCA 154; [2015] 1 All SA 153 (SCA).
[5] Ibid para 20.
[6] Ibid para 25.

stated that "It is trite that an offeror can indicate the mode of acceptance whereby a vinculum juris will be created". In *Withok Small Farms (Pty) Ltd & Others v Amber Sunrise Properties 5 (Pty) Ltd* 2009 (2) SA 504 (SCA) at 508 para 10, it was held that "It is a trite principle of the common law that, unless the contrary is established, a contract comes into being when acceptance of the offer is brought to notice of the offeror. It is also trite that an offeror may indicate, whether expressly or impliedly, the mode of acceptance by which a vinculum juris will be created". However, in this case, this stage of process had not yet been reached since the bid had not been accepted by the organ of the state – the respondent. Significantly neither party had signed the offer and acceptance forms, and neither were any conditions which were supposed to follow acceptance of the offer, in particular the issue of the final contract, complied with. In my view there is simply no contract that had come into existence and that would be the end of the matter.'[7]

[9] This court then must determine whether the plaintiff's particulars of claim, when considered in its totality, pleaded existence of a contract to sustain its cause of action. In *Living Hands (Pty) Ltd and Another v Ditz and Others*[8] the court set out an overview of general principles of exception from case law as follows:

'. . .

(a) 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.

(b) 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.

(c) 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 this purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that the summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) 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.

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[7] Ibid para 44.

[8] *Living Hands (Pty) Ltd and Another v Ditz and Others* [2012] ZAGPJHC 218; 2013 (2) SA 368 (GSJ).

(f) Pleadings must be read as a whole, and an exception cannot be taken to a paragraph or part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassment caused by a pleading can and should be cured by further particulars.'[9]

[10] It is an established principle of our law that a party's cause of action must exist when the court proceedings are initiated. Plaintiff is not entitled to approach court with no cause of action when instituting proceedings.[10] Plaintiff therefore has a duty to clearly set out averments necessary to sustain its cause of action. In its particulars of claim, Plaintiff's claim is indicated as founded on various letters of appointment issued to it by the Defendant. Plaintiff further sets out its obligations which arose in terms of these letters of appointment and pleads that it duly complied with and/or performed its obligations and/or duties in terms and in accordance with the terms and provisions of the letters of appointment forming a basis for its claim against the Defendant. What Plaintiff omits in its particulars of claim is that these letters of appointment stipulate a mode of acceptance. Importantly, Plaintiff does not plead whether it accepted appointment in accordance with the mode stipulated by the Defendant and whether this mode was followed before the contract between Plaintiff and Defendant can be said to be concluded.

[11] I have hereinabove referred to case law which indicate how the *vinculum juris* is created between the parties in a contractual arrangement. The then Appellate Division has long settled the law in this regard. By way of illustration, I refer to the matter of *Laws v Rutherfurd*[11], the facts of which are briefly as follows: The appellant was given an option to enter into a contract on the terms specified, which expired on the 26th of July. His decision to accept or decline, it was stipulated this should be communicated by registered letter addressed to the respondent at the Umtali Post Office. The appellant did not accept within the prescribed time period and on the 27th of July, the respondent requested appellant, the option having expired, to remove

[9] Ibid para 15. See also in this regard: *Barclays Bank International Ltd v African Diamond Exporters (2) (Pty) Ltd* 1976 (1) 100 (W) (*Barclays Bank*); *Van der Westhuizen v Le Roux and Le Roux* 1947 (3) SA 385 (C); *Fairoaks Investment Holdings (Pty) Ltd and Another v Oliver and Others* 2008 (4) SA 302 (SCA); *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA); and *Jowel v Bramwell-Jones and Others* 1998 (1) SA 836 (W).

[10] Ibid *Barclays Bank*; see also *Lebedina v Schetchter and Haskell* 1931 (W) 247.

[11] *Laws v Rutherfurd* 1924 AD 261.

certain plant which with the respondent's knowledge he had erected on the farm. On the 29th of July, the respondent's attorney notified an acceptance of the option, explaining that the matter had been overlooked, and that the appellant must have known that the offer had been accepted, because of the preparations made upon the property to commence work under the agreement.[12]

[12] Having considered non-acceptance of the offer as stipulated in the respondent's stipulated mode of acceptance, the then Appellate Division held that:

'As the appellant had not notified his acceptance within the time fixed and in the absence of proof that respondent had waived her right to demand definite written notice as stipulated, the rule had properly been made final.'[13]

[13] The Appellate Division restated the existing principle of our law of contract to the effect that the court cannot make new contracts for the parties; it must hold them to bargains into which they have deliberately entered. What is missing in the plaintiff's pleadings is whether the offer of its appointment was accepted in the manner and mode stipulated by the defendant.

[14] It is trite that the excipient bears the onus to show that the pleading is excipiable. It must persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed. On the other hand, the party whose pleading exception is taken is confined to the allegations contained in its pleading.[14]

[15] In the present matter, the plaintiff has failed to accept the offer of appointment as stipulated in the various letters of appointment it relies on as the basis for its cause of action. I am therefore not persuaded that the plaintiff has made sufficient averments to sustain its cause of action and present a case on trial. The plaintiff's argument that the requirement for it to acknowledge receipt and confirm acceptance of the instruction

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[12] Ibid at 261-262.

[13] Ibid.

[14] See *MEC: Department of Co-Operative Governance, Human Settlement, Free State v Scenic Route Trading 802 CC and Others* (Case No. 5158/13) (Unreported) (*Scenic Route*); also see: *Voget and 2 Others v Kleynhans* [2002] ZAWCHC 41; 2003 (2) 148 (C); and *First National Bank of Southern Africa Limited v Perry NO and Others* [2001] ZASCA 37; 2001 (3) SA 960 (SCA).

in writing is an administrative formality to confirm communication and acceptance of the instruction, does not assist its case. Primarily because its cause of action is based on the same letters of appointment that it failed to accept the offer as stipulated therein.

[16] Having considered the plaintiff's particulars of claim in the present matter, complaints on which the exception is based as well as submissions made by both the excipient and the plaintiff during argument, it is my conclusion that the plaintiff has failed to make the necessary averments to sustain its cause of action, and the exception therefore must succeed.

[17] In the second exception the excipient contended that the plaintiff's particulars of claim contained no averment that the plaintiff and/or its directors and/or its employees, were duly admitted and enrolled to practice as legal practitioners and therefore entitled to render bills of costs, payment of which is claimed in the present action. Sections 24, 30, 33, and 35 of the Legal Practice Act deals with admission, enrolment, authority to render legal services and fees in respect of legal services.

[18] The excipient referred the court to the decision of *Brodsky Trading 224CC v Cronimet Chrome Mining SA*[15] (*Brodsky Trading*) and argued that notwithstanding that this judgment dealt with the provisions of the Estate Agency Affairs Act 112 of 1976 regulating the estate agents, the principles set out in this judgment should apply to legal practitioners as the Legal Practice Act contains provisions similar to the Estate Agency Affairs Act.

[19] I will briefly set out the relevant provisions of the Legal Practice Act relied upon by the excipient. Section 24(1) of the Legal Practice Act provides that: 'A person may only practice as a legal practitioner if he or she is admitted and enrolled to practice as such in terms of this Act.'[16]

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[15] *Brodsky Trading 224CC v Cronimet Chrome Mining SA (Pty) Ltd and Others* [2016] ZASCA 175; 2017 (4) SA 610 (SCA).
[16] Section 24(1) of the Legal Practice Act 28 of 2014.

[20] Section 30(1) of the Legal Practice Act provides that:
'A person duly admitted by the High Court and authorised to be enrolled to practice as a legal practitioner must apply to the Council in the manner determined in the rules, for the enrolment of his or her name on the roll.'

[21] Section 33(1) of the Legal Practice Act provides that:
'Subject to any other law, no person other than a practising legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward-

(a) Appear in any court of law or before any board, tribunal, or similar institution in which only legal practitioners are entitled to appear; or

(b) Draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic.'

[22] In *Brodsky Trading* the court considered whether there had been compliance with ss 26 and 34A. These sections provide that no one shall perform an act of an estate agent (s 26) or receive remuneration for such an act (s 34A(1)) unless they have been issued with a valid fidelity fund certificate. The issues were not about whether the plaintiff had pleaded compliance with these requirements or not. It was whether there was compliance with these requirements.

[23] The plaintiff argued that the Legal Practice Act does not prescribe that averments regarding admission and enrolment are prerequisites for instituting legal proceedings. Prior to the enactment of the Legal Practice Act, attorneys were regulated in terms of the Attorneys Act 53 of 1979 and it has always been a requirement for attorneys to be admitted and enrolled with the relevant regulatory body. The purpose of the Legal Practice Act is, *inter alia*, to protect and promote public interest. Attorneys would then be expected to plead existence of a client's mandate which results in a client and attorney contractual relationship. The issue before me is not whether the plaintiff is in compliance with the provisions of ss 24, 30, 33, and 35 of the Legal Practice Act but whether its failure to plead compliance with the foregoing provisions renders its particulars of claim excipiable.

[24] A client's mandate is central to determination of whether there is in existence a relationship between the attorney and client.[17] I have already made a ruling regarding the first exception which deals with whether the plaintiff's pleading has made averments necessary to sustain its cause of action based on existence of the contract with the defendant. I will therefore make no finding in relation to the second exception.

[25] Regarding prejudice, the excipient argued that it has suffered prejudice and relied on *Scenic Route*, where the court stated that:

'First, prejudice in cases of this nature in not determined separately. Prejudice flows from the unnecessary expenses and costs attached to the effort in preparing a plea and for trial. Second, when the Particulars of Claim are clear and concise, the defendants will always utilise less time in replying to the allegations levelled against them.'[18]

[26] Having made a ruling regarding the first exception, I align with how Mocumie J, enunciated the principle on prejudice in relation to particulars of claim that are excipiable. I agree with the excipient's submission that it has suffered prejudice as it had to deal with excipiable particulars of claim.

Order

[27] In the circumstances, I make the following order:

1. The exception is upheld.
2. The plaintiff is granted leave to amend its pleadings within twenty (20) court days of this order, failing which, leave is granted to the defendant to apply for the dismissal of the claim.
3. The plaintiff to pay costs on a party-to-party scale, including costs of counsel on scale B.

[redacted]

NTANGA AJ

[17] *Mort NO v Chiat* 2001 (1) SA 464 (C).
[18] Footnote 14 para 18. See also *Witthal v Alexandria Municipality* 1996 (4) SA 297 (EC).

Appearances

For the defendant/excipient:	Adv Snyman
Instructed by:	Molefi Thoabala Inc.
	Bloemfontein
For the plaintiff/respondent:	Adv Modise
Instructed by:	Moruri Attorneys Incorporated
	Bloemfontein