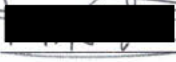


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No 2024-051116

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
2026/05/22	
DATE	SIGNATURE

In the matter between:

SALES ENABLEMENT COMPANY (PTY) LTD

Applicant

and

EXCEL SOLUTIONS FOR AUDIT (PTY) LTD

Respondent

SWIFT AUTOMATION (PTY) LTD

Second Respondent

ALTIMAX (PTY) LTD

Third Respondent

JUDGMENT

MOTHA, J

1. For adjudication before this court is an exception noted by the third defendant against the plaintiff's particulars of claim dated 9 May 2024 on the basis that the said pleading lacks averments which are necessary to sustain a cause of action. The application pivots on the fact that the third defendant is joined as a defendant in these proceedings yet no relief is sought against it and that no

legal tie (contract, delict or any recognised legal obligation) between the plaintiff and the third defendant or between the third defendant and the other parties is alleged by the plaintiff to justify the joinder of the third defendant in these proceedings.

The parties

2. The plaintiff is The Sales Enablement Company (Pty) Ltd, a company registered in terms of South African company laws.
3. The first defendant is Excel Solutions for Audit (Pty) Ltd, a company incorporated in the United Kingdom.
4. The second defendant is Swift Automation (Pty) Ltd, a company incorporated in terms of South African Company Laws.
5. The third defendant is Swift Automation (Pty) Ltd, a company incorporated in terms of South African Company Laws.

The synopsis of the facts

6. On 12 April 2022, Mr. Sibusiso Msomi, the plaintiff's director, received a LinkedIn message from Mr. Christiaan Coetzee, the first defendant's director, relating to an innovative application that could be used to enhance the work of accountants and auditors.
7. Mr. Coetzee informed Mr. Msomi that this was a new low-cost application for auditors known as The Audit Toolbar that would complement the software used by auditors in Africa. Furthermore, he told him that the first defendant required the plaintiff's expertise to market, source clients, and sell The Audit Toolbar to potential users.
8. Having worked with him at Adapt IT, he was confident that Mr. Msomi was up to the task and could deliver. A meeting was scheduled for the 2nd of May 2022.

9. On 02 May 2022, Mr. Msomi, accompanied by Mr. Bonolo Nkomo, met Mr. Coetzee to discuss how their respective companies could work together to sell The Audit Toolbar. Put differently, the first defendant sought the plaintiff's assistance in making auditors aware of The Audit Toolbar. They entered into a partnership under which the plaintiff would contribute to the growth of the first defendant's business by booking appointments with potential users for the first defendant.
10. In brief, the agreement was that the plaintiff would source out clients and take care of the sales process up to the point of quotation; and the first defendant would invoice clients and provide technical support in the sales process. Then the first defendant will pay the plaintiff the agreed 50% in perpetuity until the licensed client ceases to use the product. The commission would only become due to the plaintiff when the licensed client had paid, and if a licensed client unsubscribed from the product, the first defendant would not be obliged to pay the plaintiff in respect of that particular client.
11. At the meeting, Mr. Msomi indicated to Mr. Coetzee that the Audit Toolbar was underpriced at R 750.00 per user for the license to use the product. Mr. Msomi recommended that the licensing price be increased to R 1 450.00, and Mr. Coetzee, on behalf of the first defendant, agreed. The first defendant implemented the proposed pricing.
12. To provide maximum exposure to the Audit Toolbar, the plaintiff entered into a working relationship with the second defendant. This arrangement, which resulted in more subscribers to the product, was not only revealed to Mr. Coetzee on behalf of the first defendant but was also endorsed by him. The plaintiff's officials also arranged public webinars that provided further exposure for the first defendant's business.
13. Without going into details, the second defendant's presence had a positive impact on the business. As part of growing the first defendant's business as well as a demonstration of goodwill and commitment to the partnership, the

plaintiff also partnered with the third defendant, which has substantial experience in the Audit space. This partnership led to the Audit Toolbar being accessible to more auditors than would have been the case.

14. In August 2023, Mr. Coetzee requested to meet with Mr. Msomi and Mr. Nkomo and indicated that the first defendant should renegotiate its agreement with the third respondent. He indicated that the current agreement was structured in such a way that the first defendant would not be able to earn the same commission that was negotiated in the long term.
15. On 15 September 2023, Mr Msomi received a letter from Mr Coetzee which indicated that the first defendant was cancelling its contract with the plaintiff. In this letter, it was alleged that the plaintiff had committed fraud because it allowed the second defendant to invoice clients directly.
16. Even though the third defendant has a contract with the plaintiff, the third defendant continued to sell on behalf of the first defendant the Audit Toolbar. According to the plaintiff, this indicated that the third defendant had signed a contract with the first defendant which was deliberately intended to cut the plaintiff as the middle partner.

The exception

17. It is trite that the purpose of pleadings is to define the issues for the other party and the Court¹. In order to disclose a cause of action a plaintiff's pleadings must set out what the court said in *McKenzie v Farmers' Co-operative Meat Industries Ltd*²:

- a. "What is the real meaning of the phrase ' cause of action ...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of

¹ *Molusi and Others v Voges N.O. and Others* (CCT96/15) [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) (1 March 2016) para 28

² 1922 AD 16 at 23

evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”³

18. When pleading a strict adherence to Uniform Rule 18(4) of the Uniform Rules of Court is of paramount importance, as it sets out the following:
 - a. “Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

19. Having cited this Rule, the court in *Trope v South African Reserve Bank and Another*⁴ held:
 - a. “It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise.”

20. Citing with approval the matter of *Minister of Safety and Security v Slabbert*,⁵ the court in *Molusi* said:
 - a. “And it is for the Court to adjudicate upon the disputes and those disputes alone. Of course, there are instances where the court may, of its own accord (*mero motu*), raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert*, the Supreme Court of Appeal held:

 - b. “A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for

³ Supra para 23.

⁴ 1992(3) SA 208

⁵ [2009] ZASCA 163; [2010] 2 All SA 474

the trial court to have recourse to issues falling outside the pleadings when deciding a case.”

Analysis

21. To conclude that the pleadings are excipiable on the basis that there is no direct relief sought against the third defendant is unsound. The third defendant can elect not to enter the fray or abide by the court's decision. On the contrary, the plaintiff's action would be imperiled if the plaintiff fails to cite a party that has a direct and substantial legal interest in the subject matter. In my view, the third defendant may be prejudiced by the trial court's judgment. Hence, its presence is warranted.

22. Upon a proper perusal of the particulars of claim, this is an action for breach of contract, and the third defendant is as much at the center of the storm as the second defendant. To illustrate the pivotal role played by the third defendant in the battle between the plaintiff and the first defendant, one can do no better than to refer to paragraphs 14 and 19 in the particulars of claim:
 - a. “14 As part of growing the first defendant's business as well as a demonstration of goodwill and commitment to the partnership, the plaintiff also partnered with the third respondent, which has substantial experience in the Audit space. This partnership led to The Audit Toolbar being accessible to more auditors than would have been the case without this partnership.”

23. It need hardly be stated that the more auditors accessing the Audit Toolbar, following the partnership between the plaintiff and the third defendant, the more money the plaintiff made from its deal with the first defendant.

24. Consequently, any interference with that partnership would result in litigation which involves the plaintiff and the third defendant as explicated under paragraph 19 of the particulars of claim, which read:
 - a. “The plaintiff specifically pleads that the agreement between the first defendant and the third defendant was not entered into in good faith because

it was opportunistically used to unlawfully cancel the contract between the plaintiff and the first defendant. Due to this agreement, the first defendant decided to summarily cancel its contract with the plaintiff without indicating whether and how the plaintiff breached their contract and indeed providing a breach notice to the plaintiff.”

25. It is trite that the onus to prove that a pleading is excipiable rests with the excipient. Focusing on the test on exception, the court in *Southernport Developments (Pty) Ltd (previously known as Tsogo Sun Ebhayi (Pty) Ltd) v Transnet Ltd*⁶ held:

- i. “(i) In order for an exception to succeed, the excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it;
- ii. (ii) *A charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation;*
- iii. (iii) *The Court should not look at a pleading 'with a magnifying glass of too high power'. . . . "Minor blemishes in and unradical embarrassments caused by a pleading can and should be cured by further particulars.*
- iv. (iv) *The pleadings must be read as a whole; no paragraph can be read in isolation.”*

26. When the particulars of claim are read as a whole, the third defendant is not just a cog in the litigation machine, but a prominent and important part of the contestation between the plaintiff and the first defendant.

27. According to the particulars of claim, the facts show that the third defendant

⁶ 2003 (5) SA 665 (W),

has a direct and substantial interest in that he actively partook in the events that caused the basis and subject matter of the action. The joinder of the third defendant is appropriate in law.

Costs

28. It is trite that costs follow the results. I have not heard any sound submission why I should depart from this well-trodden path. In the result, I make the following order:

ORDER

1. The exception is dismissed with costs on party and party scale B.

A handwritten signature in black ink, which is partially obscured by a black rectangular redaction box. The signature appears to be 'MP Motha'.

**MP MOTH
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Appearances

For the Applicants : Adv N Mahlako
Instructed : Marumoagae Attorneys

For the Respondent : Adv G van der Westhuizen
Instructed : MacRoberts Attorneys

Date of hearing : 11 May 2026
Date of Judgement : 22 May 2026