

SOUTH AFRICA / JUDGMENT

Altech Netstar Fleet Solutions (Pty) Limited v XMoor Transport CC (6731/2013) [2014] ZAKZDHC 12 (2 April 2014) [2014] ZAKZDHC 12

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Pammenter

CASE / FILE NUMBER
6731/2013

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IN
THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
LOCAL DIVISION, DURBAN
CASE
NO: 6731/2013
In

the matter between:

ALTECH
NETSTAR FLEET SOLUTIONS (PTY)
LIMITED.....Plaintiff/Respondent
and
XMOOR
TRANSPORT
CC.....Defendant/Excipient
ORDER
In

the circumstances I make
the following order:

- (1)
The exception is upheld
- (2)
The Plaintiff is given 15 days to amend the Particulars of Claim;
- (3)
The Plaintiff is ordered to pay the costs of the exception.

JUDGMENT**PAMMENTER, AJ**

1] In this matter the Excipient (Defendant) has excepted to the Respondent's (Plaintiff's) Particulars of Claim in terms

of Rule 23(1) on the grounds that the same are vague and embarrassing. For the sake of convenience I shall refer to the parties as Plaintiff and Defendant. It appears from an overview of the Particulars of Claim as a whole that the Plaintiff contends that

it provided certain services to the Defendant, either to its Transport and Plant Hire Division ("the plant hire division")

or its Transport Bulk Division ("the bulk division"), with each division being allocated its own account number and which have been referred to in the Particulars of Claim as account number 1 and account number 2.

2] The Particulars of Claim consists of ten separate claims each being given an alphabetical appellation commencing A and ending J. Claims A and B arise in respect of the plant hire division and are based on a written agreement concluded by the parties on 29 April 2008 ("the written agreement"), a copy of which is annexed to the Particulars of Claim as Annexure "POC1". Likewise claim G is based on the written agreement but is in respect of the bulk division.

3] Claim C is based on an "ancillary agreement" concluded on the same day as the written agreement in terms whereof it is alleged that the Plaintiff would provide certain services to the plant hire division, relating to the fitment of certain equipment onto the Defendant's vehicles "to enable the provision of" the services to be provided by the Plaintiff in terms of the written agreement. Similarly claim J is based on an ancillary agreement in respect of the same services to be provided to the bulk division. Claim D is based on the written agreement. In the alternative it is based on what are referred to as "various oral contracts" which are thereafter referred to in the Particulars of Claim as "the oral contracts". They arise in respect of services allegedly rendered to the plant hire division. Claims E and F also arise out of the said oral contracts.

4] Claims H and I arise in respect of similar oral contracts concluded in respect of services rendered to the bulk division.

5] Clause 16.4 of the written agreement reads as follows:

"No addition to, variation or consensual cancellation of this agreement shall be of any force or effect unless in writing and signed by or on behalf of all the parties."

6] It is this clause which has given rise to the exception. In the first place the Defendant complains that it is not clear what the term “ancillary” is meant to mean. Furthermore claims C, D, E, F, H, I and J are stated to be based on oral contracts which were either “ancillary to” or concluded “pursuant to” the written agreement. They would appear to contradict the provisions of clause 16.4 of the written agreement. The Plaintiff contends that the Particulars of Claim are, as a result, vague and embarrassing.

7] Mr Collins, who appeared for the Defendant in argument relied heavily on the judgment in the well-known case of *Trope v South African Reserve Bank & Another*[1]. In this case McCreath J set out the law regarding exceptions based on a pleading being vague and embarrassing.[2] In summary the learned Judge stated:

- (a) The ultimate test is whether the pleading complies with Rule 18(4) of the Uniform Rules of Court;[3]
- (b) An exception to a pleading on the ground that it is vague and embarrassing involves a twofold consideration. The first is whether

the pleading is vague. The second is whether the vagueness causes embarrassment in the sense that the excipient is prejudiced;

- (c) As to whether there is prejudice, the learned Judge adopted the remarks of Conradie J in *Levitan v Newhaven Holiday Enterprises CC*,[4] that whether the excipient can produce an exception-proof plea is not the only test nor the most important test. If that were, then the object of pleadings which is to enable parties to come to trial prepared to meet the other party’s case and not be taken by surprise, would be defeated;
- (d) If a pleading leaves one guessing as to its actual meaning, it is vague and embarrassing.

8] Ms Strydom who appeared for the Plaintiff contended that the Particulars of Claim were not vague and embarrassing. Firstly, she

contended, that the reference to ancillary agreements as contained in claims C and J, was to an oral contract or accord which the written agreement itself contemplated that the parties would reach. In this regard she relied on the provisions of clauses 7.1.1 and 7.1.3 of the written agreement.

9] As regards the oral contracts referred to in claims D, E, F, H and I, she contended that these do not constitute an addition to or variation of the written agreement. They are separate and distinct oral contracts which were concluded from time to time between the parties, the contents of which happen to correspond with the wording of the written agreement.

10] With respect to Ms Strydom I do not agree that the ancillary agreements are covered by clauses 7.1.1 and 7.1.3 of the written

agreement. Claims C and J which refer to the ancillary agreements deal with the installation of equipment into the Defendant’s

vehicles. Clause 7.1.1 of the written agreement refers to the cost of the GSM service for which the Defendant is to pay a fixed charge “as prescribed by MTN from time to time”. It has nothing to do with an agreement relating to the installation of equipment into the Defendant’s vehicles.

11] Clause 7.1.3 provides that the Defendant shall pay a once-off connection charge on installation of “the equipment”. It further provides that “this charge is included in an initial payment per vehicles as set out in the Transaction Schedule”. The expression “Transaction Schedule” is defined in the written agreement as being

“that part of this agreement, being the Subscriber application form, which identifies the Subscriber and wherein provision is made for other particulars concerning this agreement including fees payable for the airtime ...”

12] I accept that the charges referred to in claims C and J may be considered to be the type of charge referred to in clause 7.1.3. What is clear, however, is that such charges were to be included in the Transaction Schedule which in turn was part of the written agreement. The charges were not left to subsequent oral agreement between the parties. I am of the view, therefore, that the ancillary agreements pleaded were not contemplated in the written agreement. They must, therefore, be treated in the same manner as the oral contracts referred to in the other claims.

13] There is, in my mind, no doubt that when an oral contract is stated to be “ancillary to” or “pursuant to” a written agreement it connotes some connection between the oral contract concerned and the written agreement. Therefore the terms of the oral contract would, prima facie at least, appear to be in addition to the terms of the written agreement. It follows that the terms of the ancillary agreements and oral contracts pleaded appear to conflict with clause 16.4 of the written agreement. There is ample authority that where such conflict arises, the pleading can be considered vague.[5]

14] The issue which arises, is whether the Defendant is prejudiced by this vagueness. Quite clearly the Defendant can plead to the

Particulars of Claim. It can allege that the Plaintiff is precluded from relying on the ancillary and oral contracts by virtue of the provisions of clause 16.4. Such a plea would probably evoke a replication by the Plaintiff to the effect that the ancillary and oral contracts do not constitute additional clauses to the written agreement but are rather separate and self-standing oral contracts. If the case was so pleaded, a simple and concise triable issue would arise.

15] The difficulty is, however, what if the matter is not so pleaded? What if the Plaintiff chooses not to replicate on the lines set out above? The Defendant will then be left in the dark as to precisely what case it has to meet.[6]

16] During the course of argument the effect of Basson J’s judgment in *Nel & Others NNO v McArthur & Others*[7] was debated. This case dealt with an exception on the grounds that a pleading was vague and embarrassing. Basson J held[8] that in order for an exception to succeed, it must be excipiable on every interpretation that can reasonably be attached to it. As authority for this statement, he relied on the judgment of First National Bank of Southern Africa Ltd v

Perry NO & Others.[9] This case dealt with whether the Particulars of Claim disclosed a cause of action. I accept, as Basson J did, that the principles expressed therein apply equally to an exception that a pleading is vague and embarrassing. Accordingly if, in casu, the pleading is ambiguous and one of the possible meanings would not result in it being vague and embarrassing then that is the meaning which must be accepted. However, the situation I have to deal with is slightly different. As indicated, by using the words “ancillary” and “pursuant to” the Plaintiff would appear to be alleging oral contracts which have some connection to the written agreement. The expressions are not ambiguous. Therefore no possibility of selecting one meaning which is not in conflict with clause 16.4, arises.

17] It appears to me, that if the exception were not upheld, the Defendant would be prejudiced because it would not be clear precisely

what the Plaintiff contends as regards the ancillary and oral contracts. If it contends that they are extraneous self-standing

agreements then it would be a simple matter to plead the same and it should do so.

18] In the circumstances I make the following Order:

- (a) The exception is upheld;
- (b) The Plaintiff is given 15 days to amend the Particulars of Claim;
- (c) The Plaintiff is ordered to pay the costs of the exception.

PAMMENTER AJ

Date of Hearing: 28 March 2014

Date of Judgment: 2 April 2014

Counsel for the Plaintiff/Respondent: Ms D. Strydom

Instructed by: Roy Suttner Attorneys

c/o Garlicke & Bousfield

Counsel for Defendant/Excipient: M. Collins

Instructed by: Naidoo Maharaj Inc.

[1] 1992(3) SA 209 (T).

[2] At page 211 A – E.

[3] This sub-rule requires that every pleading should contain a clear and concise statement of the material facts upon which the pleader relies with sufficient particularity to enable the opposite party to reply thereto.

[4] 1991(2) SA 297 (C) at 298 G – H.

- [5] The first such case is *Keely v Heller* 1904 TS at page 101. Other cases are referred to in *Erasmus : Superior Court Practice* at B1 – 155 fn 11.
- [6] See *Trope's case* op cit.
- [7] 2003(4) SA 142 T.
- [8] At page 149 E – F.
- [9] 2001(3) SA 960 (SCA).
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