

SOUTH AFRICA / JUDGMENT

Bencherki v Ericsson Sub Saharan Africa (Pty) Ltd (12002/2016) [2017] ZAGPJHC 115 (31 March 2017)

[2017] ZAGPJHC 115

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mashile

CASE / FILE NUMBER

12002/2016

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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

CASE

NO: 12002/2016

Date of Hearing: 20

February 2017

Date of Judgment: 31

March 2017

Reportable:

No
Of
interest to other judges: No
Revised.

In the matter between:

MR
MEHDI
BENCHERKI Appellant
And
ERICSSON
SUB SAHARAN AFRICA (PTY)
LTD Respondent

JUDGMENT

MASHILE J:

- [1] The parties have been referred to as Plaintiff and Defendant by their respective Counsel in the heads of argument. For purposes of maintaining consistency and to stay free from confusion in this judgment, I too shall refer to them as such.
- [2] The Plaintiff commenced legal proceedings against the Defendant for payment of the total amount of US\$22 350.00 on 8 April 2016. The claim was founded on a number of agreements allegedly concluded on different dates between the parties. Confronted with this claim, the Defendant served and filed a notice of intention to defend on 25 April 2016.
- [3] On 19 May 2016, believing that the particulars of claim were objectionable in several respects, the Defendant delivered a notice in terms of Rule 23 (1) to which the Plaintiff rejoined by amending his particulars of claim on 30 June 2016. On 12 August 2016 and there having been no objection to the proposed amendment to the particulars of claim, the Plaintiff delivered his amended pages thereby completing his amendment. The parties are agreed that not all the amendments contemplated in the Plaintiff's notice of amendment were effected because not all the amended pages were delivered and as such certain aspects of the particulars of claim remain unamended.
- [4] The amendment notwithstanding, the Defendant is persistent that those parts of the particulars of claim that have been amended, do not address the source of its complaints as described in the notice in terms of Rule 23(1). Naturally, the Defendant proceeded to file its exception whose attack on the particulars is threefold, namely:
- 4.1 Non-compliance with rule 18 of the Uniform Rules of Court to a degree that is prejudicial to the defendant;
- 4.2 Aspects of the particulars of claim are so vague that the defendant is neither able to distinguish the case sought to be made out nor is it able meaningfully to plead thereto; and
- 4.3 The particulars of claim fail to disclose a cause of action in that the allegations made in support of the relief claimed are either incapable of sustaining that relief, even if proved, or are bad in law.
- [5] In every litigation, parties are charged by law to deliver pleadings that comply with the prescribed legal requirements as set out, amongst others, the rules of this Court. Rule 18 (4) provides:

“Every pleading shall contain a clear and concise statement of the material

facts

upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

[6] Rule 18

(6) stipulates:

“A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.”

[7] At Page 558 of the Civil Practice of The High Courts of South Africa, Vol 1 - Juta

- by Herbstein & Van Winsen the following is stated:

“The function of pleadings “is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties”.

[8] In *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A the court said that the parties are limited to the pleadings delivered as a party will not be allowed to direct the attention of

his opponent to one issue and come to Court to canvass another. Accordingly a pleading should be so phrased that the opposite party may reasonably and fairly be required to plead thereto. See *Trope v South African Reserve Bank* 1992 (3) SA 208 (T).

[9] The above is so because, amongst other things, the pleadings “enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings an appropriate method of trial can be determined”. See *Jowell v Brandwell-Jones* 1998 (1) SA 836 (W) at 899-903. To achieve this objective a pleading should be precise. In particular it should not be vague and embarrassing; nor lack averments necessary to sustain a cause of action.

[10] A pleading is vague and embarrassing when “it is either meaningless, or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on...” See *Leathern v Tredoux* 1911 NPD 346 at 348. A pleading is also vague and embarrassing when an intelligible cause of action cannot be gathered from it. See *Keeley v Heller* 1904 TS 104 and *Factory Investments (Pty) Ltd v Record Industries Ltd* 1957 (2) SA 306 (T).

FIRST COMPLAINT:

[11] The complaint in this regard is that the Plaintiff avers the conclusion of an agreement in paragraphs 5 and 6 of his particulars of claim between Mehdi Construction Company SAL and the Defendant, acting through its authorised agent, UNITECHNIQUE LTD. He then purports to attach a copy of the agreement to the particulars of claim marked BM1.

Annexure BM1 in turn refers (in the second unnumbered paragraph thereof) to “the attached agreement” between Unitechnique Ltd and Ericsson. No such agreement is attached to annexure BM1.

- [12] A closer scrutiny of Annexure BM1 does not confirm it to be an agreement reached by Unitechnique Ltd as agent for Ericsson, as stated in paragraph 5 of the Plaintiff’s particulars of claim. None of the terms of the agreement alleged in paragraph 6. 1, 6.2 and 6.3 of the Plaintiff’s particulars of claim appear on the written agreement, annexure BM1.
- [13] In paragraph 8 of his particulars of claim, the Plaintiff avers that during the second stage of the consultancy agreement, “UNITECHNIQUE of Mr Kalla” was replaced by the Defendant’s authorised agent, namely TUS - Consulting SA de C.V. (TUS) and in paragraph 9 alleges that TUS, acting as authorised agent of the Defendant, concluded a service agreement with the Plaintiff in his personal capacity, copy which is annexed marked BM2. Surprisingly, Annexure BM2 purports to constitute a written agreement between the Plaintiff and TUS and contains no reference to TUS acting as agent for the

Defendant. Furthermore, in paragraph 11 and more particularly sub-paragraphs 11.2, 11.3 and 11.4, the Plaintiff alleges certain

terms of the agreement which do not appear from annexure BM2, or which are inconsistent with the contents of annexure BM2.

- [14] In paragraphs 12 and 13 of the plaintiff’s particulars of claim, the plaintiff alleges the conclusion of a further agreement a copy of which is annexed to the particulars of claim marked BM3. This agreement is alleged to have been concluded “between the above parties as aforesaid represented”. On the other hand and strangely, Annexure BM3 professes to be an agreement between the plaintiff and TUS and does not purport to be an agreement concluded by TUS acting as agent for the Defendant.
- [15] The Defendant’s approach to the first complaint is that it is manifest that the Plaintiff seeks no relief emanating from Annexures BM1, BM2 and BM3 because he makes the averment that the Defendant has complied with those contracts. That being so, it is gratuitous to expect the Defendant to plead thereto. The Defendant is prepared to ignore those complaints as long as the Plaintiff can acknowledge that it will not be required to plead thereto. The proposition to resolve the complaint on the above basis, as I understand it, does not detract from the allegation that the annexures are superfluous or irrelevant and renders the particulars of claim in that respect vague and embarrassing.
- [16] It is apparent from the Plaintiff’s heads as substantiated by his argument in court that he rejected the proposal put forward by the Defendant. The Plaintiff asserts that the Defendant did not allege and/or demonstrate in what way reference to the said contracts were superfluous, irrelevant or vague and embarrassing. And most importantly, it failed to allege and/or demonstrate any prejudice, let alone serious prejudice, that it has suffered as a result of the above averments by the Plaintiff. The Defendant has also not alleged inability to plead

to the said paragraphs.

- [17] The Plaintiff submitted that without proof of extensive prejudice, the exception stands to be dismissed. He denies that the paragraphs of the particulars of claim attacked by the Defendant are superfluous, irrelevant and/or vague and embarrassing. He is steadfast that he has complied with the provisions of Rule 18 and that the Defendant can and should plead thereto.
- [18] Viewed against the provisions of Rule 18 (6), the allegations made in paragraphs 5 and 6 of the particulars of claim are undoubtedly vague and embarrassing. An agreement is averred to have been concluded the terms and conditions of which are said to be contained in BM1 but BM1 does not contain anything of the kind. Instead BM1 refers to an attached agreement, which it transpires it is also not attached.
- [19] This could not have been what was envisaged by the provisions of Rule 18 (6) when it provides that a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading. Over and above this, these allegations serve no purpose because no relief is sought and can best be struck out of the particulars of claim on account of their surplusage.
- [20] Similarly, the allegation that Unitechnique was replaced by Tus as an agent of the Defendant and that it subsequently concluded an agreement with the Plaintiff in his personal capacity is vague and embarrassing because BM2 does not confirm that allegation. Instead BM2 is an agreement concluded by Tus, not as an agent of the Defendant, and the Plaintiff in his personal capacity. Needless to repeat that this is offensive to Rule 18 (6) the contents of which are described above. Again in paragraphs 12 and 13 the Plaintiff refers to the conclusion of an agreement 'between the above parties as aforesaid represented'. A proper reading of this should mean that Tus must have acted as an agent and the Plaintiff in his personal capacity. However, the agreement does not bear this out as it demonstrates that Tus acted on its own while the Plaintiff too did so in his personal capacity. Accordingly, it too falls foul of the provisions of Rule 18 (6).
- [21] I am persuaded that the allegations pertaining to the three agreements are vague in consequence of which the Defendant is embarrassed to plead as it does not know how or to what precise allegation to plead. Once a party is embarrassed in this manner, prejudice becomes an inescapable corollary. This Court would be irresponsible to allow the Defendant to plead to allegations whose worth to the entire claim of the Plaintiff is not immediately evident. The allegations are accordingly struck out on the ground that they are superfluous and irrelevant.

SECOND COMPLAINT:

[22] The second complaint, as articulated by the Defendant, concerns the averment made by the Plaintiff in paragraph 15 of his particulars of claim. The averment is that at about the end of 2014, or the beginning of 2015, the Plaintiff and the Defendant concluded an oral agreement with the intention of reducing the terms thereof and other agreements “into writing”. The Plaintiff fails to:

22.1 Allege who represented him in concluding the oral agreement;

22.2 State where the oral agreement was concluded;

22.3 Identify the “other agreements” which the parties intended to reduce to writing and furthermore fails to state the relevance of the “other agreements”.

[23] The Defendant concludes that the particulars of the Plaintiff’s claim are not in conformity with rule 18 of the Uniform Rules of Court and are vague and embarrassing. In response to this complaint, the Plaintiff respectively refers to paragraphs 8, 9, 12 and 15 of his pre-amended particulars of claim where he pleads that:

23.1 “During the second stage of the consultancy agreement, UNITECHNIQUE of Mr Kalla, was replaced by the Defendant’s yet another authorised Agent viz. T U S – Consulting S.A. de C.V. (TUS), a company based in Mexico and that had hitherto represented the Defendant in South America and owned by one Thomas Uhleman Schultz and whose full and further particulars are to the Plaintiff unknown.

23.2 TUS, acting as an authorised agent of the Defendant, concluded a Service Agreement with the Plaintiff, in his personal capacity a copy of which is annexed hereto marked BM2.

23.3 On about 1 January 2014 a further contract between the above parties as aforesaid represented concluded a further contract annexed hereto as BM3.

23.4 During about the end of 2014, or the beginning of 2015, the Defendant and Plaintiff as aforementioned concluded an oral agreement and with the intention of reducing the terms thereof and other agreements into writing.”

[24] In response to the Defendant’s notice in terms of Rule 23 (1) of the Uniform Rules of Court, the Plaintiff purported to amend by inserting the missing information. It is common cause that to date the particulars of claim remain unamended as he has failed to serve and file his amended pages thereby stopping short of perfecting the amendment. In the circumstances, the complaint in that regard is still unresolved. The aforesaid common understanding is recanted in the heads of the Plaintiff’s Counsel who regards it as resolved. Save to state that the amendment has not been perfected, I do not need to delve into the apparent contradiction on this point between the heads of the Plaintiff and what the actual position is.

[25] The Plaintiff contends that the effect of the words “as aforementioned” are commonly understood as above described. They seek to repeat the parties as described in the first long paragraph that detailed the relationship between the two parties

i.e. The Defendant as represented by its authorised agent (TUS) and the Plaintiff self-representing. This explanation offered by the Plaintiff would in any other context hold but in this instance it does not. This must be so because it is plain from the contents of BM3 that when TUS concluded it with the Plaintiff in his personal capacity, it did not do so as an agent of the Defendant. The

embarrassment requires no elaboration because it is apparent that the Defendant does not know whether to plead to the allegation of TUS as self-represented or as an agent of the Defendant. Notwithstanding the Plaintiff's intransigent claim of compliance with Rule 18, the particulars of claim remain vague and embarrassing in this regard.

[26] In addition to the above, the employment of the phrase, 'as aforementioned', in paragraph 15 of the Plaintiff's particulars of claim clutters a number of paragraphs with vagueness leading to the Defendant not knowing how to plead to the allegations. Accepting the meaning assigned to the phrase by the Plaintiff, in paragraph 5 of the particulars of claim the Plaintiff is said to have represented a company known as Mehdi Construction Company SAL and the defendant acting through its authorised agent Unitechnique Ltd concluded a written agreement on 10 May 2012. The following questions arise from the allegation:

26.1 Did the Plaintiff personally represent Mehdi Construction SAL or did another party act in his stead in concluding the agreement?

26.2 Who represented Unitechnique Ltd when it acted as an agent of the Defendant in concluding the agreement?

[27] With regard to the allegation contained in paragraph 8, the unavoidable question to raise is, who represented TUS when it concluded the agreement as an agent of the Defendant? Similarly, with regard to paragraph 9, who represented TUS when it concluded the Service Agreement as an agent of the Defendant with the Plaintiff acting in his personal capacity? Finally, who represented the respective parties when the agreement in paragraph 12 annexed as BM3, was concluded? These questions arise because both Rules 18 (4) and

(6) envisage the provision of such information under analogous circumstances.

[28] Again, assigning the meaning ascribed to the phrase: "as aforementioned", by the Plaintiff, Counsel for the Defendant has contended that the Plaintiff is left to speculate on whether it is intended to mean as the parties were represented when they concluded the first agreement, the second agreement or the third agreement, as the case may be, and in none of these cases is the individual (the natural person) who is said to have been representing the defendant, or its agent, identified.

[29] It is expected that the Defendant being such a large multinational corporation will find it difficult if not impossible to readily identify these transactions because of the non-disclosure of material facts upon which the Plaintiff has based his claims. Unless the complaints are corrected, the Defendant is necessarily prejudiced.

- [30] It is beyond contention that paragraph 15 whether in its original form or not is vague. As pointed out by Counsel for the Defendant, there is mention of an oral agreement but no month or date on which the oral agreement was concluded is stated. Furthermore, no reference of the place where it was concluded is made and the Defendant is left to speculate who represented the parties in concluding the agreements.
- [31] Still on paragraph 15 of the particulars of claim, the Plaintiff makes reference to ‘reducing the oral agreement and other agreements into writing’. The Plaintiff makes no effort to identify these ‘other agreements’. Besides, one does not know how those ‘other agreements’ are connected to those that are identified in his particulars of claim. Again, it is clear that the particulars of claim are vague and embarrassing because they lack particularity.
- [32] This Court agrees with the submission of Counsel for the Defendant that ordinarily non-compliance with the rule in a single respect may not necessarily cause prejudice if the conclusion of the agreement is otherwise pleaded with full particularity as to date, place, form and subject matter. The defendant is then more likely to be able to identify the events referred to. But when each of these features is more vaguely pleaded than the next, the prejudice becomes apparent. There is thus no doubt that the affected allegations, in the manner currently pleaded, are vague and embarrassing causing the Defendant not to know how to plead thereto.

THIRD COMPLAINT:

- [33] The third complaint concerns the claim of payment of the amount of US\$3 000 000.00 being for the period 31 January 2015 to 31 December 2017. The allegation is that the term of the oral agreement that gave rise to the claim provided that the Plaintiff “shall secure the release of Ericsson’s funds held in the Central Bank of Angola”. The summons commencing the action for the claim of the amount was issued on 8 April 2016. The argument is therefore that part of the amount claimed, US\$R2 000 000.00, which would have fallen due at the end of 2016 and 2017 could not have been due and payable at the time when the summons was issued.
- [34] The particulars of plaintiff’s claim therefore lack averments necessary to sustain the plaintiff’s claim for payment of US\$3 000 000.00. The Plaintiff could only claim the amounts as they fell due at the end of each calendar year. At the time when the summons was issued there was only one amount of US\$R1 000 000.00 that had fallen due at the end of 2015. By claiming the total amount of R3 000 000.00, the Plaintiff is seeking to claim amounts for which he had not rendered any services. In the premises, the particulars of claim lack averments necessary to sustain the action for the claim of the amounts of R1 000 000.00 each for the calendar years, 2016 and 2017.
- [35] The heads of the Plaintiff do not reply to this complaint at all despite making reference thereto. This is evident from the following paragraph that I uplifted from his heads of argument:

“As third ground of exception, Defendant complains that the Plaintiff alleged that he had concluded a contract with the Defendant to secure the release of the latter’s money from the Central Bank of Angola and that he has failed to state that he has secured the release of the said funds and therefore does not allege that he complied with his obligations in terms of the alleged oral

agreement.”

[36] In the next paragraph, the Plaintiff then quotes paragraph 17 of his particulars of claim in an attempt to demonstrate how he has complied. This is totally off the mark as it is clear that the complaint raised by the third complaint has nothing to do with what the Plaintiff is addressing here.

FOURTH COMPLAINT:

[37] This complaint relates to paragraphs 18 to 21 of the Plaintiff’s particulars of claim where he alleges that the Plaintiff and the Defendant still represented by its authorised agent TUS, concluded an agreement for the development of business relations and improvement thereof for which he would be paid an amount of US\$2 600 000 for the services rendered in terms of this agreement on or before 15 December 2015. The Plaintiff alleges further that he complied with the terms of this agreement and was entitled to payment of the amount of US\$2 600 000.

[38] The Defendant believes that the particulars of the Plaintiff’s claim are vague and embarrassing, alternatively, fail to disclose a cause of action in that:

38.1 In contravention of rule 18, the Plaintiff fails to state whether the agreement was oral, tacit or in writing. Furthermore, he does not state where the agreement was concluded, who represented the plaintiff and who represented TUS in concluding the agreement as agent for the Defendant;

38.2 The allegation that the agreement was “for the development of business relations and improvement thereof” is so vague as to be meaningless;

38.3 The allegation in paragraph 20 that the plaintiff “complied with the terms of the above agreement” is so vague as to be devoid of meaning.

[39] As an answer to this complaint, the Plaintiff refers to paragraph 18 of his particulars of claim where he avers that he and the Defendant ‘still’ represented by its authorised agent TUS, concluded an agreement for the development of business relations and improvement thereof. The Plaintiff argues that it is evident that reference to the word “still” refers to the Defendant’s Agent mentioned in the particulars of claim. The Plaintiff believes that he has removed the cause of complaint because he has amended his particulars of claim to include the location of the conclusion of the contract.

- [40] The Plaintiff concludes that the Defendant had again failed to allege and prove serious prejudice that it has suffered or could have suffered such that it could not plead to the Plaintiff's particulars of claim. For that reason he contends that the exception must be dismissed.
- [41] The Plaintiff does not seem to appreciate that the insertion of the place where the agreement was concluded alone cannot cure the defect in the particulars of claim. Assuming that the amendment had been perfected in the respect alleged by the Plaintiff, which is not, the fact that the Defendant does not know whether or not the agreement was tacit or oral or written and where and by whom on behalf of the parties the agreement was concluded constitutes an incontestable prejudice to it.
- [42] Contrary to what the Plaintiff believes, the word, still, does not disclose who represented the parties when the agreement was concluded. This in fact goes back to the respects that I have found to be vague and embarrassing earlier in this judgment. If TUS acted on its own, the question is, who was the natural person who represented it? If it acted as an agent for the Defendant, still the Plaintiff would have been expected to disclose the natural person who represented TUS as an agent of the Defendant. Accordingly, prejudice in these circumstances is undeniable.
- [43] Insofar as the plaintiff's obligations arising in terms of the contract mentioned in those paragraphs, which are described as "the development of business relations and improvement thereof" are concerned the vagueness is plain. In which way or manner was he to develop or improve the business? Where was the development and promotion of the business to take place? Over what period was the development and promotion of the business to take place?
- [44] The allegation raises interminable questions, which is distinctive of a term that is ambiguous and lacking in particularity. Such manner of pleading is specifically prohibited in Rule 18 (4). It comes as no surprise that the Defendant finds itself embarrassed to plead to the Plaintiff's allegation that he has complied with the term that is regarded as vague. In the circumstances I agree that the particulars of claim of the Plaintiff are vague and embarrassing in that respect and necessarily prejudicial to the defendant's ability either to plead thereto or to know what case it has to meet.

FIFTH COMPLAINT:

- [45] The essence of this complaint is that the Plaintiff in paragraph 22 of his particulars of claim alleges that in 2014 the parties concluded an oral agreement by which he was instructed and he agreed to conclude a three-year contract for the National Development in Angola which contract was to take effect from January 2015. In paragraph 23 the Plaintiff goes on to allege that he would be paid an amount of US\$12 000 000.00 in three annual installments of US\$4 000 000.00 for each year being 2015, 2016 and 2017 ostensibly as remuneration for agreeing to conclude the agreement that would then commence in January 2015.

[46] The plaintiff then concludes by alleging that the Defendant has failed to enter into the above three-year contract with the Plaintiff, which conduct demonstrated its bad faith.

Extraordinarily, in paragraph 36.4 of his particulars of claim, he alleges that the Defendant is liable to pay to the Plaintiff the sum of US\$12 000 000.00 arising from the successful conclusion and the development of the business in Angola which commission was to be payable over a period of three years.

[47] The Defendant believes that the particulars of claim are vague and embarrassing alternatively, fail to disclose a cause of action in that:

47.1 The allegation that the Plaintiff was instructed and that he agreed to conclude a three-year contract for the National Development is so vague as to be devoid of any meaning;

47.2 The Plaintiff simultaneously alleges the conclusion of an agreement between him and the Defendant and that the latter failed to conclude the said three-year agreement;

47.3 If the Plaintiff's complaint is that the defendant failed to conclude an agreement which it had undertaken to conclude, such agreement would constitute an "agreement to agree", which would not constitute a valid agreement under South African law;

47.4 Insofar as the Plaintiff alleges that the oral agreement constitutes a binding agreement pursuant to which he would be entitled to payment of US\$12, 000 000 00, he does not allege that he complied with his obligations in terms of that agreement.

[48] The Plaintiff's answer to the complaint raised in sub-paragraph 47.3 above is that because the Defendant can raise the defence that an agreement to agree is not recognised under the South African law then the particulars of claim are not vague and embarrassing or do disclose a cause of action. This might be true but the point is that they do not disclose a cause of action because such an action is non-existent in this country's laws. Why should the Defendant instead of raising an exception now waste time pleading to a law that is invalid? It follows that the Plaintiff's response pertaining to sub-paragraph 47.4 above must suffer the same fate as it too leans on the availability of a defence to the Defendant. I am at complete loss that the Plaintiff fails to perceive or appreciate the prejudice inherent to the Defendant caused by his manner of pleading.

[49] More fundamentally, the Plaintiff does not attend to the complaints raised by the Defendant in sub-paragraphs 47.1 and 47.2 above. In the absence of the name of the party who instructed the Plaintiff to conclude the contract and the terms of such a contract, the allegation must be hollow and ought to be discarded. Paragraphs 23 and 36 stand in direct contrast to each other. On the one hand, in paragraph 23 the Defendant is said to have failed to conclude the three-year agreement while in paragraph 36 it is sued on the basis of the same three-year contract that he is averred not to have concluded. .This is of

course assuming that an agreement to agree was recognised in the South African law. The prejudiced that will ensue if the

Defendant were to plead thereto is noticeable and it is simply that it will be a waste of time to plead to a non-existent law.

SIXTH COMPLAINT:

[50] The Defendant has formulated this complaint in the following terms:

“29 In paragraph 25 of his particulars of claim, the plaintiff alleges that he “concluded other various ad hoc ORAL agreements with the defendant” with the intention of reducing the said agreements into a written agreement to be referred to as the Consultancy Frame Agreement.

30 In paragraph 26 the plaintiff alleges that the parties agreed to record “the terms of the above oral agreement” into “the Consultancy Frame Agreement” to be drafted by the defendant’s legal representatives and to be presented to the plaintiff for his perusal, consideration and signature thereof.

31 In paragraphs 27 and 28 the plaintiff avers that the Consultancy Agreement duly drafted by the defendant’s officials or legal representatives is annexed as BM4 and that it was accompanied by the defendant’s General Conditions of Service annexed as BM5.

32. In paragraph 29 and subparagraphs 29.1 to 29.2 the plaintiff sets forth that which he alleges to constitute the terms of “the said oral agreement”.

33. In paragraph 30, plaintiff alleges compliance or partial compliance with its obligations in terms of the “said oral agreement” referred to in paragraph 29. More specifically, in subparagraphs 30.3 and 30.4 the plaintiff refers to performance by him which does not correspond to his alleged obligations in terms of the oral agreement referred to in paragraph 29.

34 In subparagraphs 31.1 and 31.2 the plaintiff claims payment of US\$2 600 000.00 and US\$4 750 000.00 respectively, from the defendant.

35. The particulars of plaintiff’s claim of vague and embarrassing, alternatively, fail to disclose a cause of action, in that:

35.1 The “various ad hoc oral agreements” referred to in paragraph 25 are neither identified nor pleaded in the manner required by rule 18 of the Uniform Rules of the High Court;

35.2 The document annexed as BM4 does not purport to be a consultancy agreement between the plaintiff and the defendant but appears to constitute a standard form document setting forth “Ericsson’s General Conditions for Services”.

35.3 Likewise the consultancy agreement allegedly annexed as BM5 does not purport to constitute an agreement between the parties, but appears to constitute a draft generic Consultancy Frame Agreement.

35.4 None of the terms alleged in paragraph 29 and subparagraphs 29.1 to 29.3 appear from annexure’s BM4 or BM5.

35.5 The allegations in paragraph 29.3 rely on an agreement to conclude an agreement which is invalid under South African law.

35.6 The plaintiff does not allege that his performance corresponds to its alleged contractual obligations.”

- [51] In reply to the complaint that the various adhoc agreements are neither identified nor pleaded in a manner required by Rule 18, the Plaintiff submits that it is evident that from the Particulars of Claim and in paragraphs 29.1 – 29.3 thereof that he sets out the material, alternatively, tacit or implied terms of the oral agreement referred to in paragraph 25 of his Particulars of claim. Insofar as the complaint that BM4 and BM5 are not what they purport to be, the Plaintiff avers that it is obvious that Annexures BM4 and BM5 have been swapped. That being the case, this complaint should not have formed part of this exception.
- [52] Other than as aforesaid, the Plaintiff does not pay his attention to the other complaints but submits that in any event the Defendant has not demonstrated serious prejudice that it may or could have suffered such that it could not plead to the Plaintiff’s Particulars of claim. The fact is, however, that the adhoc oral agreements have not been identified and neither response of the Plaintiff addresses that complaint.
- [53] If Annexures BM4 and BM5 have been inadvertently swapped, the easiest would have been for the Plaintiff to remove the complaint by simply rectifying the mistake. It is within a party’s right to proceedings to expect that papers annexed as part of a case purport to be what they are. In this instance therefore the Defendant was right to have accepted what they are and treated them as such. Accordingly, as the documents stand now, none of the terms referred to in paragraph 29 and sub-paragraphs 29.1 to 29.3 matches that which is contained in Annexures BM4 and BM5. In the circumstances the Defendant must be prejudiced as it does not know which of the two conflicting cases to meet. To the extent that sub-paragraph 29.3 constitutes an agreement to agree, it has been found earlier in this judgment not to be valid under the South African law

SEVENTH COMPLAINT:

- [54] The complaint pertaining hereto is that in paragraph 32 of his particulars of claim, the Plaintiff alleges that the Defendant ignored, alternatively, refused or further alternatively, neglected to pay the plaintiff for services rendered from 2013 to date. In paragraph 33 of the particulars of claim, he continues to allege that notwithstanding “the above” on or about 26 November 2015, the defendant’s Magnus Mchunguzi “acknowledged” the draft consultancy agreement and the terms thereof as between the Plaintiff and the Defendant. Lastly, in paragraph 34 the Plaintiff alleges that despite “the above” the Defendant persistently ignored all attempts by the plaintiff “to formalise the oral agreements, and for payment of outstanding monies.”
- [55] The particulars of claim are said to be vague and embarrassing, alternatively, fail to disclose a cause of action, in that:

55.1 The relevance of the defendant's Magnus Mchunguzi having "acknowledged" the draft consultancy agreement and the terms thereof is not discernible from the particulars of plaintiff's claim;

55.2 It is unclear what is meant by the allegation that the defendant Magnus Mchunguzi "acknowledged" the draft consultancy agreement, or what the legal significance thereof is alleged to be;

55.3 In alleging that the defendant persistently ignored all attempts by the plaintiff to "formalise the oral agreements" it is unclear whether the plaintiff alleges that:

55.3.1 The oral agreements were valid and binding as oral agreements or, alternatively;

55.3.2 Such agreements would only have been binding in the event that they were formalised into written agreements and that the defendant's failure or refusal to have concluded written agreements (i.e. formalise the oral agreements) constitutes a breach thereof.

55.4 In the event that the plaintiff intended the meaning paraphrased in paragraph 39.3.2 above, any such agreement would constitute an agreement to agree and, unenforceable under South African law.

[56] The essence of the Plaintiff's response to this complaint is that the Defendant has a defence to the allegations made in the paragraphs mentioned above. The mere fact that it does, is proof that it can plead to the allegations. It follows therefore, reasons the Plaintiff, that the allegations are neither vague and embarrassing nor disclose no cause of action.

The Plaintiff concludes that the Defendant has failed to allege or prove that it was prejudiced by any of the Plaintiff's

allegations.

[57] Reference to Magnus Mchunguzi having acknowledged the draft consultancy agreement and the terms thereof is indeed confounding as it appears lost and misplaced. It is not surprising that the Defendant does not know what legal significance to attach to the phrase: 'acknowledgment of the consultancy agreement'. Does this mean that he approved of it or that he signed it and that it became a binding agreement or was he acknowledging the correctness of the terms? The questions are endless and that is an indication of a vague and embarrassing allegation. The Defendant cannot attach any single meaning to it and it is as such understandable why it is prejudiced to plead thereto.

[58] A further allegation that is not capable of a single meaning is that pertaining to the Defendant persistently ignoring all attempts by the Plaintiff to formalise the oral agreements. What does formalise in this context mean? Would their formalisation have made them binding as oral agreements or does formalise mean reducing them into writing so that they could be binding? Again, the Defendant must necessarily be prejudiced to plead thereto as it does not know which of the meanings to assign to the phrase. Accordingly, the allegation is vague and embarrassing.

[59] In the result, the application succeeds and I make the following order:

1. All the exceptions are upheld;
2. The particulars of claim are struck out in their entirety;
3. The Plaintiff is afforded 20 days from date hereof within which to deliver his notice of his intention to amend his particulars of claim;
4. The Plaintiff shall pay the costs of this application.

BA MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

For the applicant: Adv

Instructed by: Kunene Rampala Inc

For the Respondent: Adv.

Instructed by: Bowman Gilfillan Inc

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Prepared on 9 October 2026 · Esheria