

SOUTH AFRICA / JUDGMENT

Ndarangwa v Marivate Attorneys Incorporated (61033/2021) [2024] ZAGPPHC 471 (17 May 2024)

[2024] ZAGPPHC 471

COURT

North Gauteng High Court, Pretoria

BEFORE

PG Louw

CASE / FILE NUMBER

61033/2021

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THE REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

GAUTENG DIVISION,
PRETORIA

Case Number: 61033/2021

(1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE: 17 May 2024

SIGNATURE

In

the matter between:

DIANA

NDARANGWA

Plaintiff

and

MARIVATE

ATTORNEYS INCORPORATED

Defendant

Delivered:

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and time

for hand-down is deemed to be 10:00 on 17 May 2024.

Summary: Exception

– defendant alleging that particulars of claim is vague and embarrassing and/or lacks averments necessary to sustain a cause of action – ten grounds

of exception raised –

nine pertaining to the vague and embarrassing element –

two-fold consideration – (i) whether

pleading lacks

particularity to the extent that it is vague; and (ii) whether

vagueness causes embarrassment of such a nature that it causes

prejudice – court finding neither of the considerations met –

one ground pertaining to lack of necessary

averments to sustain cause

of action element – duty to persuade the court that upon every interpretation which the particulars

of claim, and the document on

which it is based, can reasonably bear, no cause of action is

disclosed – court finding this

is not so in this case –

none of the grounds of exception bears merit – exception not upheld.

Application to strike out

opposing affidavit in response to exception – defendant

alleging irregular step by plaintiff –

test – whether

opposing affidavit is irrelevant and/or vexatious

– court having to determine whether opposing affidavit should be considered

in determining the exception – court

finding opposing affidavit irrelevant – not vexatious –

prejudice – court finding the defendant

would be prejudiced

because the rules don't make provision for an opposing

affidavit to exception – also no opportunity

for a reply –

application to strike out succeeds – opposing affidavit not

taken into account in determining exception.

Punitive cost order –

court finding plaintiff's conduct not reprehensible enough to warrant punitive cost order.

JUDGMENT

PG LOUW, AJ

Introduction

- [1] What falls to be decided in this matter is an exception to the plaintiff's particulars of claim and an application to strike out the plaintiff's opposing affidavit filed in response to the exception.
- [2] During December 2021, the plaintiff instituted an action against the defendant, a firm of attorneys incorporated as a personal liability company. The plaintiff's claim is based on a written agreement in terms of which the plaintiff rendered services to the defendant. A copy of the agreement relied upon is attached to the particulars of claim.

- [3] The plaintiff pleads inter alia as follows:

"4.1 On 12 June 2020 at or near Pretoria the parties entered into a written agreement in terms of which the Plaintiff rendered services to the Defendant. A copy of the agreement is attached hereto ...

4.2 It was an implied term of the agreement that the Plaintiff would

render an invoice for the services rendered. It was a further implied term of the agreement that the invoice, as rendered by the Plaintiff would be paid within 30 days from date of same by the Defendant.

5.1 The Plaintiff rendered legal services to the Defendant in the amount

of R 840 000.00 (eight hundred and forty thousand rand). The invoices are attached hereto ...

5.2 The amounts as stated in the invoices are due and payable to the

Plaintiff by the Defendant.

6. Notwithstanding demand, the Defendant neglected/refused to [make payment] to the Plaintiff in the amount of R 840 000.00 The letter of demand is attached hereto ...

7. The Defendant is indebted to the Plaintiff in the amount of R 840 000.00."

- [4] The defendant delivered a notice in terms of rule 23(1) of the Uniform Rules of Court during February 2022, and delivered its exception in March 2022. During argument it was confirmed on behalf of both parties that the exception was filed timeously and, if not, the plaintiff did not take issue with the timing of the delivery of the exception. The matter was ripe for hearing.

- [5] In response to the exception, the plaintiff delivered a notice of intention to oppose the exception, as well as an opposing affidavit during March 2022.

- [6] Clearly taken aback by this approach, the defendant, also in March 2022, delivered a notice in terms of rule 30 stating that the plaintiff's opposing affidavit comprises an irregular step and/or a failure to comply with the rules. The plaintiff disagreed that the opposing affidavit constituted an irregular step and/or non-compliance with the rules on the grounds set out in a notice labelled "plaintiff's reply under rule 30(2)(b) of the Uniform Rules of Court" delivered in April 2022.
- [7] During March 2023, the defendant delivered an application to strike out the plaintiff's opposing affidavit. The plaintiff served a notice of intention to oppose the striking-out application the next day, but did not deliver an answering affidavit to the application to strike out.
- [8] The defendant withdrew its notice in terms of rule 30 during February 2024, a few weeks prior to the hearing of the matter before me.

The exception

- [9] The exception is brought on the basis that the particulars of claim is vague and embarrassing and/or lacks averments which are necessary to sustain a cause of action. The defendant relies on ten grounds in support of the exception.
- [10] Mr Mboweni appeared for the defendant and submitted that all the grounds of exception, except the fourth ground, should be read in context and not in isolation. He submitted that the fourth ground renders the particulars of claim excipiable on the basis that it does not sustain a cause of action. The other grounds of exception, he submitted, pertain to allegations which render the particulars of claim vague and embarrassing. Mr Mboweni also submitted that if I uphold one of the grounds of exception, I need not deal with the others.
- [11] The crux of the fourth ground of exception is the following:

"4.2 To the extent that the Plaintiff relies on the attached written agreement;

4.2.1 the agreement attached to the particulars of claim is not signed by the Defendant and not legally binding.

4.2.2 the Plaintiff failed to plead whether the Defendant agreed to her rendering the services that she alleges to have rendered to the Defendant."

- [12] The second ground of exception is aimed at the plaintiff's failure to plead that a true copy of the agreement is attached to the particulars of claim. The third ground of exception is aimed at the plaintiff's failure to plead the type of services, and in which capacity she rendered the services. Closely related is the first ground of exception, which is aimed at the plaintiff's failure to plead her occupation in support of the allegation that she rendered legal services to the defendant.

[13] The seventh and tenth grounds of exception also relate to the agreement and the copy thereof attached to the particulars of claim. It essentially pertains to the period of the agreement, the terms of the agreement in respect of which the defendant is alleged to be in breach, and whether the agreement is still in force. According to the defendant, the agreement is invalid in law because it is not signed by the defendant.

[14] The remaining grounds of exception (fifth, sixth, eighth and ninth grounds of exception), essentially, pertain to the calculation of the quantum and the copies of the invoices attached to the particulars of claim. The defendant objects inter alia thereto that the plaintiff fails to plead how the claimed amount was calculated, when and how the invoices were submitted to the

defendant, and that the plaintiff fails to attach a list of the bills allegedly drawn by the plaintiff.

The opposing affidavit and the striking-out application

[15] In the plaintiff's opposing affidavit, she sets out "an outline of the facts and circumstances that occasioned the claim against the [defendant] and which are contained in the particulars of claim". The plaintiff states that:

"3.10 [I]t is apposite at this juncture for me to bring to the attention of this Honourable Court that prior to the Independent Contractor Agreement, I had been employed as a full-time employee of the [plaintiff] performing the same services as I was now called upon to do under the new agreement.

3.10.1. on the 15th of May 2020, the [defendant] amongst many other reasons, the other being the one stated below, wrote a letter of termination of service to me and stated therein that my contract of employment was aligned to the Service Level Agreement signed between the [defendant] and the Road Accident Fund and that as a result of the termination of that service level agreement, the termination thereof would mutatis mutandis affect my own contract of employment with the [defendant]. I annex the letter as ..."

[16] The plaintiff annexed her previous employment contract, a letter of confirmation of employment, proof of payment by the defendant to the plaintiff and other annexures to the opposing affidavit.

[17] The plaintiff states that the agreement "was initially made orally with an understanding that it would be reduced to writing and signed by both parties ... I signed the finalised agreement and submitted the same to the [defendant] for his signature while I had already started performing my duties in providing the services described in exhibit A annexed to the Independent Contractor Agreement". She further states that the agreement was not subsequently signed by the defendant.

[18] In the opposing affidavit, the plaintiff deals with the grounds of exception and sets out argument in respect thereof. Evidence pertaining to the rendering of services by the plaintiff is also set out.

- [19] The plaintiff also raises a point in limine in the opposing affidavit that the defendant delivered its rule 23(1) notice without having filed a notice of intention to defend, which constitutes an irregular step. The plaintiff did not persist with the point in limine. I was referred to the defendant's notice of intention to defend served on 1 February 2022. Nothing more needs to be said about the point in limine.
- [20] Before I deal with the grounds of exception, it is necessary to decide whether the opposing affidavit should be taken into consideration in determining the exception. Ms Sono, who appeared on behalf of the plaintiff, could not refer me to any judgment where an affidavit filed in opposition to an exception was accepted by the court in determining the exception.
- [21] As I understood the argument advanced in support of the plaintiff's entitlement to file the opposing affidavit to the exception, Ms Sono submitted that the exception is an application incidental to the action between the parties. Ms Sono submitted that an exception is a pleading and that the opposing party may elect to respond thereto under rule 6(11). She further submitted that the provisions of rule 23(4) do not prevent the defendant from filing an opposing affidavit to the exception. Reliance was placed on *Skjelbreds Rederi A/S and Others v Hartless (Pty) Ltd*;[1] *International Executive Communications Ltd t/a Institute for International Research v Turnley and Another*;^[2] and *National Director of Public Prosecutions v Phillips and Others*.^[3]
- [22] These judgments are not authority for the proposition that an opposing affidavit may be filed in response to an exception. These judgments deal inter alia with the trite position that in application proceedings, the affidavits constitute not only the evidence but also the pleadings.
- [23] The application to strike out is brought on the basis that the opposing affidavit is irrelevant and/or vexatious. The defendant alleges that the opposing affidavit is not only irregular but also irrelevant. The defendant alleges prejudice because additional allegations are set out in the opposing affidavit which are not contained in the particulars of claim, and the defendant does not have a right of reply thereto.
- [24] In the application to strike out, the defendant relies on the provisions of rule 6(15). The provisions of rule 23(4) are also referred to in support of the contention that the opposing affidavit is unnecessary and/or irrelevant where an exception has been raised.
- [25] In the defendant's heads of argument, reliance is placed on the provisions of rule 23(2) which empowers the court on application to strike out a matter inter alia on the grounds that it is irrelevant or vexatious.
- [26] I was referred to *Du Toit v Du Toit and Another*^[4] where Retief J stated that:^[5]

“To confuse the issues yet further, Jacobus set the second rule 30 notice down by notice on affidavit in terms of rule 6(11), now an opposed interlocutory application. This is when it is procedurally trite that the determination of any rule 30 need not be supported by an affidavit. All that the subrule requires is that the notice must specify the particulars of the irregularity or impropriety complained of. The procedure is analogous to an exception and does not provide for a reply.” [Underlining added.]

[27] In Du Toit this court held that:[6]

“An exception is a legal objection to a pleading. It complains of a defect inherent in a specific pleading at that time. It therefore

follows why, when an exception is taken, a court must look at that pleading excepted to as it stands at the time the exception is taken: no facts outside those stated in the pleading can be brought into issue and no reference may be made to any other document.”

[Footnote omitted.]

[28] Interestingly, counsel for the plaintiff also referred me to authority for the propositions that where an exception is taken, the court must look at the pleading excepted to as it stands and no facts outside those stated in the pleading can be brought into issue, except in the case of inconsistency – and no reference may be made to any other document.

[29] According to the defendant, the opposing affidavit is vexatious because the course adopted by the plaintiff in filing the opposing affidavit in response to the exception is prohibited by the rules, in particular rule 23(4), which provides that no further plea, replication or pleading over shall be necessary when an exception has been taken to a particular pleading or an application to strike out is made.

[30] Apart from the authorities referred to herein above, the principle that a court is confined to the pleading against which the exception was taken and that no reference may be made to any other document, is legion.[7]

[31] In the circumstances, I am compelled to hold that the novel approach adopted by the plaintiff in delivering an opposing affidavit in response to the exception cannot be sustained. Simply put, in determining the exception I am bound to the particulars of claim (and, of course, the exception) only.

[32] In light of such a finding, it follows that the opposing affidavit is irrelevant, i.e., the allegations contained in the opposing affidavit do not apply to the matter at hand and do not contribute in one way or the other to decide the exception.[8]

[33] In light of this finding it is not necessary for me to decide whether the opposing affidavit is vexatious. Vexatious matter refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.[9] I do not think that the opposing affidavit is so worded as to convey an intention to harass or annoy the defendant. However, I make no finding in this regard because I have already found that the opposing affidavit is irrelevant.

[34] The first requirement of a striking-out application being met, the next question is whether the court is satisfied that if the opposing

affidavit is not struck out, the defendant would be prejudiced.[10]

[35] In my view, allowing the opposing affidavit to stand will be prejudicial to the defendant even if I do not take the contents of the opposing affidavit into account in determining the exception, because no provision is made in the rules for an opposing affidavit to be filed to an exception, and because the defendant does not have an opportunity to reply to the opposing affidavit.

[36] The application to strike out the opposing affidavit must therefore succeed.

Costs (application to strike out)

[37] The defendant seeks a punitive cost order against the plaintiff if the application to strike out succeeds.

[38] In *Treatment Action Campaign v Minister of Health*[11] the court granted an attorney and client cost order against the respondent where an application was needlessly caused by the conduct

of the respondent. The plaintiff's conduct in this matter, especially if compared to the respondent's conduct in *Treatment Action Campaign*, is not so reprehensible to justify a punitive cost order.

[39] Although the novel approach adopted by the plaintiff is not sustainable, there are no special considerations why I consider it just to grant a punitive cost order.

[40] I now deal with the exception.

Analysis of the exception

[41] In *Pillay and Another v Shaik and Others*[12] the purchase agreements allegedly concluded by the appellants with the developers of a sectional title development had not been signed on the developers' behalf. Applying the doctrine of quasi- mutual assent, the High Court found the agreements to be binding. On appeal, the Full Court reversed the decision of the trial court, finding that, because the agreements had not been signed on behalf of the developers, they were not binding. The Supreme Court of Appeal disagreed with the Full Court and held that:[13]

“I do not agree with the court a quo’s conclusion that there could be no binding contracts between the parties unless each was signed by or on behalf of the buyers and the sellers. In my opinion it is clear from Goldblatt v Freemantle, supra, and the authorities cited therein that, in the absence of a statute which prescribes writing signed by the parties or their

authorised representatives as an essential requisite for the creation of a contractual obligation (something that does not apply here), an agreement between parties which satisfies all the other requirements for contractual validity will be held not to have given rise to contractual obligations only if there is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract can come into existence.”

[42] The purchase agreement in Pillay contained inter alia a so-called whole agreement clause and a non-variation clause.[14] At the end of the purchase agreement, there was provision for the parties and their witnesses to sign, separately demarcated positions

being made available for the signatures of the purchaser and the seller.[15]

[43] The agreement relied upon by the plaintiff also contains a so-called whole agreement clause as well as a non-variation clause. Provision is also made at the end of the agreement for the parties and their witnesses to sign. The name of the plaintiff appears in manuscript in this portion with a signature appended below. The agreement is not signed by or behalf of the defendant or any witnesses.

[44] Mr Mboweni referred me to the judgment of Mokose J in Government Employees Medical Scheme v Mazibuko.[16] In Mazibuko the plaintiff relied on a written agreement, and attached an unsigned copy thereof to the particulars of claim. The agreement attached to the particulars of claim only contained the signature of the defendant. Mokose J held that: [17]

“I am of the considered view that it is not evident ex facie the agreement that the plaintiff is the ‘Participating Family

Practitioner’ and that the defendant did appoint the plaintiff in such a position. The plaintiff’s particulars of claim do not comply with the rules of court and are therefore vague and embarrassing. Accordingly, the attachment of the particulars of claim do not support the averments and the exception is upheld.”

[45] A distinguishing factor in the present matter from Mazibuko is that the agreement in Mazibuko provided that:[18]

“The appointment of the Participating Family Practitioner shall commence once this agreement has [been] signed by both parties ...”. [Underlining added.]

[46] In my view, the agreement in Mazibuko was of the kind referred to by the Supreme Court of Appeal in Pillay where compliance with a formality is required before a binding contract can come into existence. The agreement in this matter does

not contain a similar clause to the effect that the agreement would only come into existence upon the compliance of a formality such as it being signed by both parties.

- [47] Even if I am wrong in this regard, the fact that the agreement is not signed by both parties would not render the particulars of claim excipiable on the basis that it does not sustain a cause of action.
- [48] In order to succeed with an exception on the basis that no cause of action is disclosed, the defendant has a duty to persuade the court that upon every interpretation which the particulars of claim, and the document on which it is based, can reasonably bear, no cause of action is disclosed, failing which the exception ought not to be upheld.[19] It is “only if the court can conclude that it is impossible to recognise the claim, irrespective of the facts as they might emerge at the trial, that the exception can and should be upheld”.[20]
- [49] I cannot exclude at this juncture the possibility that evidence to be led at the trial in this matter can sustain the agreement relied upon by the plaintiff.
- [50] In Mazibuko, the exception was upheld on the basis that the particulars of claim is vague and embarrassing. The ultimate test in determining whether an exception should be upheld on the basis that it is vague and embarrassing, is prejudice.[21] An exception to a pleading on the ground that it is vague and embarrassing requires a two-fold consideration: (i) whether the pleading lacks particularity to the extent that it is vague; and (ii) whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced in the sense that he/she cannot plead or properly prepare for trial.[22]
- [51] I can think of no plausible reason why the defendant is not in a position to plead to paragraph 4 of the particulars of claim. The

defendant has not discharged its onus to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

The defendant has not satisfied me that it would be “seriously prejudiced” if the particulars of claim were allowed to stand and the defendant did not make out a “very clear, strong case” for the exception to succeed.[23]

- [52] The same applies to the second part of the fourth ground of exception, namely that the plaintiff fails to plead whether the defendant agreed to the plaintiff rendering the services she alleges to have rendered to the defendant. The plaintiff pleads that an agreement was entered into between the parties, and relies on a copy of the agreement attached to the particulars of claim, in which the services agreed upon are described in “Exhibit A” attached thereto. “Exhibit A” is not attached to the summons which is before me, but this was not raised in the exception. I am limited to the grounds of exception raised in the exception.
- [53] The defendant has not persuaded me that the second part of the fourth ground of exception is sufficient to show that the particulars of claim is excipiable on the basis that it does not disclose a cause of action or that it is vague and embarrassing.

- [54] In the circumstances, the fourth ground of exception cannot be upheld.
- [55] The first ground of exception raises the issue that the plaintiff does not disclose her occupation, which is necessary to support the allegation that she rendered legal services to the defendant. According to the defendant, such failure renders the particulars of claim vague and embarrassing. The point is also raised that the provisions of rule 17(4) are not complied with.
- [56] Rule 17(4) provides that every summons shall set forth inter alia the plaintiff's occupation. Although the plaintiff does not plead her occupation, I do not consider the plaintiff's failure to disclose this in the particulars of claim as fatal. The exception does not set out the reason why the plaintiff has to plead her occupation to support the allegation that she rendered legal services to the defendant. Put differently, as the exception currently reads, it does not draw a nexus between the failure to plead the plaintiff's occupation and vagueness amounting to embarrassment and embarrassment amounting to prejudice.
- [57] The second ground of exception, namely that the plaintiff fails to plead that the agreement attached to the particulars of claim is a true copy of the agreement upon which the plaintiff relies, does not render the particulars of claim vague and embarrassing. Rule 18(6) requires that a true copy of the written agreement must be annexed to the particulars of claim. The rule does not require that it be pleaded that the copy attached is a true copy. The plaintiff pleads that a copy of the agreement (which she relies on) is attached to the particulars of claim. If the defendant is of the view that the copy of the agreement attached to the particulars of claim is not a true copy, it can raise it in its plea and it can be dealt with by means of the machinery provided for in terms of rule 35 at the appropriate time.
- [58] The third ground of exception, namely that the plaintiff fails to plead the type of services she rendered and in what capacity she rendered the services to the defendant, cannot be sustained either. In paragraph 5.1 of the particulars of claim, it is alleged that the plaintiff "rendered legal services" to the defendant. Even if I accept, to the defendant's benefit, that legal services may only be rendered by certain (qualified and/or registered) individuals, the exception is silent as to why the plaintiff's failure to plead the capacity in which she rendered the services would render the particulars of claim vague and embarrassing. I can think of no plausible reason, and none was presented to me, why the defendant cannot plead to this allegation.
- [59] In the fifth ground of exception, the defendant contends that it is unable to ascertain the exact amount being claimed by the plaintiff and how that amount was "arrived at". This ground of exception is misconceived because the amounts set out in the invoices attached to the particulars of claim add up to the claim amount of R840,000.00. The defendant can clearly plead to this allegation.

- [60] The complaint raised in the sixth ground of exception is that the plaintiff fails to plead when and how the invoices, of which copies are attached to the particulars of claim, were submitted to the defendant and the plaintiff failed to attach proof of service of the invoices to the defendant. According to the defendant, this renders the particulars of claim vague and embarrassing and lacking averments necessary to sustain the cause of action.
- [61] Ex facie the agreement, it is indeed a term of the agreement that the plaintiff would submit invoices to the defendant for payment on a weekly basis and that the defendant would pay the plaintiff within thirty days after receiving an invoice.
- [62] Although the plaintiff does not plead that it submitted invoices to the defendant, the plaintiff pleads that it rendered services to the defendant, that the invoices are attached to the particulars of claim and that the amounts stated therein are due and payable. The particulars of claim is neither vague, nor embarrassing in this regard. By virtue of the fact that the invoices are attached to the particulars of claim, which has been served on the defendant, the cause of action pleaded has, to my mind, been completed.
- [63] The seventh ground of exception reads thus:

“7.1 To the extent that the Plaintiff relies on annexure ‘AA’ [the agreement attached to the particulars of claim];

7.1.1 annexure ‘AA’ does not contain the period of the alleged agreement

7.1.2 the Defendant is unable to ascertain the period within which the alleged agreement was applicable.

7.1.3 the Plaintiff, although not specifically pleaded, seems to suggest that the Defendant is in breach of the agreement, however the Plaintiff fails to plead which terms of the agreement did the Defendant breach.

7.1.4 annexure ‘AA’ is not signed by the Defendant and is in law invalid.

7.1.5 the Plaintiff fails to plead whether there is another valid agreement that she will rely on in support of her claim against the Defendant.

7.2 The Plaintiff’s particulars of claim is vague and embarrassing

and/or lacks averment (sic) necessary to sustain the Plaintiff’s cause of action and the Defendant is unable to plead thereto.”

- [64] I have already dealt with the issue that the agreement is not signed by the defendant herein above. That fact does not, in itself, render the agreement invalid. I do not understand from the exception, the relevance of the duration [“period”] of the agreement or why the defendant cannot plead to this allegation. Insofar as the breach of the agreement is concerned, the plaintiff pleads that the claim amount is due and payable to her by the defendant and that the defendant has, notwithstanding demand, neglected or refused to make payment thereof. The breach relied upon is self-evident in my view, namely that the

defendant is alleged not to have made payment of amounts which are due and payable by it to the plaintiff.

[65] Finally, in respect of the seventh ground of exception, I can think of no reason in this matter why it would be excipiable for the plaintiff not to plead “whether there is another valid agreement that she will rely on”. The plaintiff pleads the agreement she relies on. Nothing more is required in this regard.

[66] The eighth ground of exception is aimed at copies of the invoices attached to the particulars of claim. They are alleged to be “blank”. The copies of the invoices attached to the particulars of claim are simply not blank. They contain inter alia a description “Bills Drawn ...”, the number of bills drawn and the amount claimed in respect thereof. They include dates, bank details and so forth.

[67] The defendant further objects on the basis that a list of bills allegedly drawn is not attached to the particulars of claim and that the defendant is unable to ascertain which bills the plaintiff is referring to. To my mind, the bills relied upon by the plaintiff

would constitute *facta probantia* (evidence) as opposed to the *facta probanda* (material facts) which need to be pleaded.[24]

[68] In the ninth ground of exception, the defendant states that the plaintiff ought to have pleaded that the invoices were received and acknowledged by the defendant, and that the amounts thereon were “settled” between the parties.

[69] Ex facie the agreement, it does not require the defendant to have acknowledged receipt of the invoices. I have already held under the sixth ground of exception that the plaintiff’s failure to plead that she submitted the invoices to the defendant is not fatal and that the defendant indeed received the invoices, copies of which are attached to the particulars of claim. It was accordingly not necessary for the plaintiff to plead that the invoices were received and acknowledged by the defendant. Insofar as the second leg of the ninth ground of exception is concerned, it is not clear what it is aimed at. Does it pertain to the liquidity of the claim? Does it pertain to whether or not the claimed amount is due? The exception does not provide an answer to these questions. It is not apparent from the exception why the plaintiff ought to plead that the invoices and the amounts thereon were “settled” between the parties.

[70] Finally, the tenth ground of exception:

“10.1 To the extent that the Plaintiff relies on annexure ‘AA’ which does not clearly state the contract and date;

10.1.1 the Plaintiff failed to plead whether the alleged agreement still exists and/or is still in force;

10.1.2 the Plaintiff failed to plead what must happen to the agreement in the event that the agreement is still in force.

10.2 The Defendant is unable to ascertain whether the contract relied on by the Plaintiff is still ongoing or has been cancelled and as a result, the Defendant is unable to ascertain whether the Plaintiff is entitled to claim the amount claimed.

10.3 The Plaintiff's particulars of claim is vague and embarrassing and/or lacks the averments necessary to sustain the cause of action against the Defendant, the Defendant is unable to plead thereto."

[71] Although the signature date of the agreement is not indicated thereon, the commencement date thereof is indicated as 12 June 2020. In its terms, it would terminate upon the completion of the services by the plaintiff or upon 30 days prior written notice.

[72] The plaintiff is not claiming cancellation and damages, but specific performance in the form of payment of what she alleges she is owed in terms of the agreement for services rendered. The plaintiff does not need to plead facts to show the agreement is still in existence. She pleads that the agreement was entered into and performance of the defendant's obligation is claimed, namely the obligation to pay. Continued existence of the agreement is naturally implied.

[73] An exception should be dealt with sensibly and not in an over-technical manner.[25] As such, the court looks benevolently instead of over-critically at a pleading.[26]

[74] Ultimately, the defendant must satisfy the court that it would be seriously prejudiced if the particulars of claim is allowed to stand.[27]

[75] I am not satisfied that the defendant will be "seriously prejudiced" if the exception fails.

[76] For the reasons dealt with herein above, none of the grounds of exception bears merit and the exception cannot succeed.

Costs (exception)

[77] The action was instituted in December 2021. It is now more than two years later and the defendant is yet to deliver a plea in this matter. I am not privy to the reasons for the (on the face of it) delay in this matter progressing and I make no finding in respect thereof, but I think it is appropriate to state,[28] that it is in the interests of justice that this matter be adjudicated by the trial court.

[78] Insofar as the issue of costs is concerned, there is no reason why costs should not follow the result in the exception. The plaintiff, correctly in my view, seeks costs of the exception on the party and party scale.

[79] This matter was argued before me on 28 February 2024. Judgment was reserved and the parties filed supplementary heads of argument on 4 and 5 March 2024, respectively.

[80] On 12 April 2024, rule 67A came into effect. Rule 67A(3)(a) requires that party and party costs be awarded on one of three

scales. There is no indication in the rule that its provisions are applicable retrospectively. Wilson J had occasion to deal with this aspect in *Mashavha v Enaex Africa (Pty) Ltd*[29] and held the view that the provisions of rule 67A can only apply prospectively.[30] With this statement, I respectfully agree. It is therefore not necessary for me to request submissions from the parties pertaining to the appropriate scale of party and party costs in this matter.

Order

[81] In the premises the following order is granted:

1. The plaintiff's opposing affidavit to the defendant's exception (dated 22 March 2022) is struck out in its entirety.
2. The plaintiff is ordered to pay the costs of the striking-out application.
3. The defendant's exception dated 7 March 2022 is dismissed.
4. The defendant is ordered to pay the costs of the exception.

PG LOUW

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for Plaintiff : Adv MM Sono Instructed by: Samalenge Attorneys
Counsel for Defendant : Mr N Mboweni Instructed by: Marivate Attorneys
Date of hearing: 28 February 2024
Date of judgment: 17 May 2024

[1] 1982

(2) SA 739 (W) at 742.

[2] 1996

(3) SA 1043 (W) at 1050.

[3] 2002

(4) SA 60 (W) at 106.

[4] [2023] ZAGPPHC 1923.

[5] At para 22.

[6] At para 25.

[7] See, for instance, the authorities cited by Van Loggerenberg in *Erasmus: Superior Court Practice* Volume 2, Second Edition at D1 Rule 23-3 note 2 and D1 Rule 23-4 note 2.

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- [8] Helen Suzman Foundation v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC) at para 28.
- [9] Id at para 28.
- [10] Id at para 27.
- [11] 2005
- (6) SA 363 (T).
- [12] 2009
- (4) SA 74 (SCA).
- [13] At para 50.
- [14] At para 19.
- [15] At para 20.
- [16] [2019] ZAGPPHC 136.
- [17] At para 14.
- [18] At para 10.
- [19] Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk 1988
- (2) SA 493 (A) at 500E - F; First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA 960 (SCA) at para 6. See also Van Loggerenberg at D1 Rule 23-4.
- [20] Tembani and Others v President of the Republic of South Africa and Another 2023 (1) SA 432 (SCA) at para 16; Shopfitters Studio (Pty) Ltd v Dynamic Design Upholstery (Pty) Ltd
- [2022] ZAGPPHC 926 at para 10.
- [21] Quinlan v Macgregor 1960
- (4) SA 383 (D) at 393G.
- [22] Trope v South African Reserve Bank and Another and Two Other Cases 1992 (3) SA 208 (T) at 211A-B; Merb (Pty) Ltd and Others v Matthews and Others [2021] ZAGPJHC 693 at para 13.
- [23] Merb Id at para 10.
- [24] See McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 at 23; Makgae v SentraBoer (Koöperatief) Bpk 1981 (4) SA 239 (T) at 245D.
- [25] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking and Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at para 3.
- [26] Merb above n 22 at para 9; First National Bank of Southern Africa Ltd above n 19 at 972I.

[27] Merb above n 22 at para 10; Francis v Sharp and Others 2004 (3) SA 230 (C) at 240E-F.

[28] As I have done elsewhere, see N.W.M v N.Q.M and Another

[2023] ZAGPJHC 956.

[29] [2024] ZAGPJHC 387.

[30] At para 12.

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