
**NOT REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO. 884/2021

In the matter between:

**MAYIBUYE TRANSPORT CORPORATION** Plaintiff

And

**KUBUPAY (PTY) LTD** Defendant

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**JUDGMENT IN RESPECT OF**
**EXCEPTION RAISED BY DEFENDANT TO**
**PLAINTIFF'S AMENDED PARTICUARS OF CLAIM**

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**HARTLE J**

[1] The defendant excepted to the plaintiff's amended particulars of claim on the bases both that certain averments contained therein are "meaningless", and

that they lack averments to sustain its purported claim. That claim is alleged to be for payment of the sum of R7 432 872.92 as a so-called refund of a purchase price for a fare evasion system paid, and the service fee to maintain that system, arising upon the breach of an underlying contract pursuant to which those goods and services were procured.

[2] The latter pleading was the plaintiff's attempt to remove the cause of the defendant's previous complaint that the particulars were vague and embarrassing and contained irrelevant averments, but those issues do not necessarily follow a continuum with the present objections.

[3] The amended particulars of claim was preceded by the requisite notice in terms of rule 23 (1) (a), but not the present exception.[1]

[4] One of the aspects which the plaintiff evidently sought to address in the latest rendition of its claim particulars (no doubt prompted by the defendant's prior objections) was the obvious lack of any connection between the defendant as presently cited and the entities who on the face of it allegedly concluded the underlying agreement with the plaintiff at the centre of the claimed contractual breach. The plaintiff (in the first edition of its particulars of claim) had alluded to a written copy of the professional service agreement forming the basis for its claim incorporating a document drawn on behalf of Vix-Questek (Pty) Ltd in the format of a proposal to the plaintiff ("MTC1"), and a service level agreement concluded between the plaintiff and Vix Technology South Africa ("MTC2").

[5] What was obviously lacking in the pre amended particulars of claim was an allegation that explained the relevance of those entities in relation to the

[1] Perhaps the reason for the absence of any notice in terms of rule 23 (1) (a) is that the plaintiff pleaded under the constraints of a notice of bar.

defendant or the connection between those two separate agreements and the parties' supposed rights and obligations forming the basis for the plaintiff's present claim against KubuPay (Pty) Ltd.

[6] Under the amended particulars of particulars of claim the plaintiff, after relating the particulars of the defendant as a registered company, chose to explain that:

> "3.1 Defendant also trades under the name and style of Vix-Questex (Pty) Ltd or Vix Technology South Africa under the same registration number and head office address;
>
> 3.2 In view of the afore-going, any reference to KubaPay (Pty) Ltd, Vix-Questex (Pty) Ltd or Vix Technology South Africa refers to the same entity being the Defendant herein."

[7] The defendant registered its complaint in this regard in the present exception as follows:

> "3. The defendant, a juristic person, cannot in law trade under the name and style of another juristic person, to wit Vix-Questek (Pty) Ltd, much less under the same registration number, as is apparent from section 14 (1) (a) of the Companies Act; nor can any reference to the defendant simultaneously be a reference to Vix-Questek (Pty) Ltd, as the plaintiff has pleaded in paragraph 3 of its amended particulars of claim.
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> 4. The result is that the contents of paragraphs 3.1 and 3.2, insofar as the plaintiff purports to plead that the defendant trades as Vix-Questek (Pty) Ltd under the same registration and that any reference to the defendant is also a reference to Vix-Questek (Pty) Ltd or *vice versa* are meaningless and should be regarded as *pro non scripto.*"

[8] This objection by the defendant is justified, but will self-evidently not be addressed by simply removing paragraphs 3.1 and 3.2 from the equation.

[9] In my view it certainly requires an explanation how the plaintiff can be looking to the defendant to pay its claim for a "refund" arising on the basis of agreements that on the face of it were not concluded with KubuPay (Pty) Ltd, the present defendant.

[10] The answer according to the parties lies in the fact that KubuPay (Pty) Ltd previously traded as Vix-Questek (Pty) Ltd. The registration number of the defendant is the same as that of Vix-Questek (Pty) Ltd, but the connection between it and Vix Technology SA is however not understood. Reading between the lines (I refer in this respect to the proposal) Vix-Qestek had an "association" with Vix Technology which however seems to be an entirely different entity from Vix-Questek (Pty) Ltd or KubuPay (Pty) Ltd. I tried in vain to glean from the annexures relied upon by the plaintiff what role was played by each entity and how Vix Technology SA came to be involved (or what their nexus is to either the plaintiff or the defendant) but there appears to be a disconnect in the narrative.

[11] The formal complaint raised by the exception though is that the plaintiff is suggesting (in the present manner pleaded), that KubuPay (Pty) Ltd was trading as Vix-Questek (Pty) Ltd. Logically however one company cannot trade in the name of another company, rendering the offending allegation bad in law.

[12] A simple explanation that puts the prior trading name into perspective in relation to the defendant should suffice. The plaintiff has tried to say as much in paragraph 3 of the amended particulars of claim but unfortunately has come up short and somewhat clumsily given the spectre of Vix Technology SA on the horizon.

[13] In the first round the plaintiff referred to two agreements underlying its claim. In the amended particulars of claim it pleads that the parties' agreement instead compromises of three parts including firstly the tender proposal in response to a tender invitation ("MTC1") by Vix-Questek (Pty) Ltd, secondly the award of the tender after the completed bidding process ("MTC2") to Vix Questek (Pty) Ltd on terms set out in the letter of award, and thirdly the service level agreement ("MTC 3") which as I have said above appears on the face of it to be one entered into between the plaintiff and Vix Technology.

[14] Leaving aside the curious deficiencies (which the defendant has not touched upon in the present exception) concerning what was agreed with who exactly, and why the contest is between the plaintiff and the defendant presently, the defendant is additionally concerned that the averments actually made are inadequate to sustain the purported cause of action relied upon by the plaintiff. In this respect the defendant has no concern with the plaintiff's assertion that the three documents above comprise the whole agreement now relied upon by the plaintiff but takes issue with the lack of essential terms pleaded from the composite agreement by it - these are limited to those highlighted in paragraph 8 of the amended particulars of claim, that relate to its purported claim for a "refund."

[15] The defendant asserts as follows in this respect:

> "11. As such the way that the plaintiff has pleaded, these payments were paid *sine causa*.[2]
>
> 12. The amended particulars of claim lacks sufficient allegations to sustain any claim for enrichment.
>
> 13. There is also no basis in law to claim a "*refund*" from the defendant, on the allegations as pleaded by the plaintiff in its amended particulars of claim; not

[2] The plaintiff has ostensibly not said what went before to warrant a refund, i.e. that a payment was made, on what basis that was made in the first place, and why there ought to be a "refund".

> even upon a cancellation of the agreement. Accordingly, the particulars of claim lack allegations sufficient to sustain a claim for a refund."

[16] The reference to a "refund" is confusing and misleading because the plaintiff's claim appears rather to be one for damages arising from a claimed contractual breach. Enrichment does not enter the picture. (The defendant cannot however be blamed for raising the objection on the basis upon which the plaintiff has strictly pleaded.)

[17] Even if one discounts the wrong impression created on the pleadings by the word "refund" and reads it as representing the nature of damages flowing from the alleged breach, the point is well taken by the defendant that not all the elements for such a claim have been pleaded.

[18] Assuming that the plaintiff's objective by the refund is to be put back in the same position it would have been had no contract being concluded (negative *interesse*), the plaintiff is still obliged to state clearly what the essential terms of the composite agreement are on which reliance is placed, firstly to justify the cancellation (based on an alleged breach), and secondly to justify why a refund falls to be made.

[19] A perusal of the particulars of claim as they stand probably achieve the first part, but do not explain how and why and in what form damages flow in the nature of a "refund" of the purchase price and service fee previously paid upon cancellation of the agreement. The defendant's concern is that there is no suggestion that the payment sought to be recovered was a requirement of the contract in the first place or that there was any performance in this respect justifying a claim for such monies to be refunded.

[20] As was stated in the exception, none of the terms of the agreement (constituted by the three annexures) as pleaded by the plaintiff in paragraph 5 required any performance on its part, much less payment to the defendant by it. The plaintiff has simply failed to point to any clause that obligated the plaintiff to pay any amount whatsoever. Simply put, there is no averment of any obligation to have paid.

[21] Without this consequential flow of all the necessary elements for the plaintiff's claim, the particulars of claim do not disclose a cohesive cause of action, alternatively suffer from vagueness that goes to the root of its claim. This causes obvious prejudice to the defendant who cannot be expected to plead to the particulars of claim as they presently stand.

[22] In the result I am satisfied that the exception should be upheld and that costs should follow the result even though it was expected of the defendant in these circumstances to have given prior notice to the plaintiff to remove the cause of its complaint regarding its concern that allegations in the amended particulars of claim are vague and embarrassing. I would however have found in any event that the particulars of claim were objectionable by virtue of the absence of a cohesive and sensible cause of action pleaded.

[23] In the result I issue the following order:

1. The exception is upheld.

2. The plaintiff's particulars of claim dated 14 October 2021 are struck out in their entirety.

3. The plaintiff is afforded a period of fifteen (15) days from the date of this order to file a further set of amended particulars of claim.

4. The plaintiff is to pay the defendant's costs of the exception.

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**B HARTLE**
**JUDGE OF THE HIGH COURT**

DATE OF HEARING: 8 September 2022
DATE OF JUDGMENT : 2 February 2023

*Appearances :*

*For the Plaintiff : Mr. A Bishop instructed by Mbabane & Maswazi Inc., East London (ref. Mr. Mbabane - MTC/1231).*
*For the Defendant : Mr. Mayekiso instructed by Petersen Hertog Attorneys, c/o Diffiord Underwood Inc,. East London (ref. Ms. Underwood).*