IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 2433/2019

In the matter between:

THE UNIVERSITY OF THE FREE STATE Excipient[1]

and

CHRISTO STRYDOM NUTRITION (CSN) Respondent[2]

In re

THE UNIVERSITY OF THE FREE STATE Plaintiff

and

CHRISTO STRYDOM NUTRITION (CSN) Defendant

Coram:	Opperman, J
Date of hearing:	13 May 2022
Judgment Delivered:	18 July 2022
Summary:	Exception - defense - written agreement/contract - tacit/implied terms

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1 "University"/ "UFS"/ "Plaintiff"/ "Excipient".
2 "CSN"/ "Defendant"/ "Respondent". "CSN" is the acronym for "Christo Strydom Nutrition".

JUDGMENT

[1] The exception that lies before court in terms of Rule 23(1) of the Uniform Rules of Court[3] revolves around a written agreement.[4] The University as the excipient notified on 17 December 2021 that: "the Defendant's Plea is vague and/or embarrassing and/or lacks averments which are necessary to sustain a defense."[5] In essence; the defense is bad in law. The defense is without legal merit.

[2] The first claim of CSN is that the parties cited in the written agreement are incorrect. In addition, that there exists a tacit agreement between the parties that the University was, at the time of the signing of the written agreement, suitably accredited to do scientific tests on the products of CSN to guarantee the quality thereof. Crucially, that the results will be recognised not only in South Africa, but worldwide.

[3] Conduct "bad in law" and the derision by litigants of the administration of justice have become a menace in courts. It erodes the foundation of the Rule of Law. The veracity; and capacity of the administration of justice is the quarry.

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3 Rule 23(1): *Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defense*, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that—
(a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and
(b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.
[Amended by GNR.1262 of 1991 and substituted by GNR.1343 of 18 October 2019.]

4 The written agreement is attached as addendum to the judgment to give perspective to the reader of the judgment. At paragraph 3.1 of the Defendant's Plea, they refer to the agreement as "the contract" and counsel for CSN also refers to the agreement as a contract in his Heads of Argument. Most of the precedent relied upon by the parties also refer to contracts. It is thus common cause that the written agreement has the status of a contract. See *Christie's Law of Contract in South Africa*, GB Bradfield, 8th Edition, last updated: 2022, LexisNexis, https://www.mylexisnexis.co.za/Index.aspx as on 14 July 2022 at Chapters 2 & 3.

5 Bundle: "Index" dated 13 April 2022 at pages 38 to 49; specifically at paragraph 1.7. on page 41.

[4] There are two concepts relevant in the instance: "Bad in law" as understood in litigation and process and secondly; unbecoming conduct that emanates from a written agreement or contract.

[5] A contract or written agreement, as a pledge, suggests honour and integrity and thus; law and conduct that is good.

[6] Litigation may not be abused to evade contractual responsibilities. The law pertaining to exceptions have evolved over many decades and Harms[6] has surmised it in detail with reference to case law:

1. An exception is a valuable part of the system of procedure; its principal use is to raise and obtain a speedy and economical decision on questions of law which are apparent on the face of the pleadings.
2. The leading of unnecessary evidence is avoided.
3. An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
4. If evidence can be led which can disclose a cause of action or defense alleged in a pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action or defense.
5. Causes of action or defenses are not in the first instance dependent on questions of law. They require the application of legal principle to a particular factual matrix.
6. The test on exception is whether on all possible readings of the facts no cause of action or defense is made out.
7. *It is for the excipient to satisfy the Court* that the conclusion of law for which the plaintiff or defendant contends cannot be supported upon every interpretation that can be put upon the facts.
8. Unless an exception is taken for the purpose of raising a substantive question of law, which may have the effect of settling the dispute between the parties, an excipient should make out a very clear case in order to succeed.
9. Exceptions are generally not the appropriate procedure to settle questions of interpretation.
10. *The same applies to the pleading of implied (strictly tacit) terms; the test on exception is whether the trial court could (not "should") reasonably imply the term alleged.*

[6] *Civil Procedure in the Superior Courts*, Part B High Court, UNIFORM RULE 23 EXCEPTIONS AND APPLICATIONS TO STRIKE OUT, Exceptions, Last Updated: March 2022, LexisNexis, https://www.mylexisnexis.co.za/Index.aspx as on 6 July 2022.

11. The object of an exception is not to embarrass one's opponent but to settle the case (or part of it) in an inexpensive and easy fashion or to protect oneself against an embarrassment that is so serious that it merits the costs of an exception.
12. The court should not look too critically at a pleading.
13. Unless the excipient can satisfy the court that there is a real point of law or a real embarrassment, the exception should be dismissed.
14. An exception is not permissible against part of a pleading unless that part consists of a self-contained cause of action or defense. *The case must be adjudicated as a whole*.
15. When courts consider exceptions, no additional facts may be adduced by either party and the court must assume that the facts alleged in the relevant pleading are correct.
16. The *excipient must persuade the court* that upon every reasonable interpretation of the averments, no cause of action or defense is established thereby.
17. A pleading is not vague and embarrassing simply because the other party cannot prepare for trial. Whether a pleading is vague, is a question of degree.
18. The ability to plead a general denial does not mean that the pleading is not embarrassingly vague.
19. The rule cannot be used to attack the vagueness of a contract relied upon by a party; it is only concerned with pleadings.
20. The *onus is on the excipient* to show both vagueness amounting to embarrassment and embarrassment amounting to serious prejudice.

[7] To regress, on 31 May 2019 the University of the Free State, a Higher Education Institution duly registered in terms of the Higher Education Act 101 of 1997 lodged an action against Christo Strydom Nutrition (CSN), a company with limited liability, wherein they claim payment of the amount of R768 330.25 (SEVEN HUNDRED AND SIXTY-EIGHT THOUSAND THREE HUNDRED AND THIRTY RAND AND TWENTY-FIVE CENT) being the balance of the amount which is due, owing and payable by the defendant to the plaintiff, for GOODS DELIVERED AND/OR SERVICES RENDERED, by the plaintiff to the defendant.

[8] The plaintiff issued summons against the defendant based on a written agreement settled and signed on 17 September 2015. Christo Strydom signed the agreement in person. Christo Strydom is a 64-year-old man and seasoned businessman. His business is apparently international and substantial. The agreement is succinct and clear.

[9] Two defenses were pleaded by CSN:[7]

The first defense: "Erroneous citing of parties to the written agreement/contract"

1. CSN avers that the agreement was not entered into between CSN and the plaintiff but between the plaintiff and an entity known as Silkblaze 11 (Pty) Ltd (2007/001392/07).
2. The defendant seeks rectification of the agreement on this aspect.
3. Silkblaze was represented by Christo Strydom.
4. At the time when the agreement was reduced into writing the common intention of the parties was that the plaintiff and Silkblaze would enter into the agreement.
5. The plaintiff drafted the agreement and "mistakenly" prepared the document reflecting the defendant as the contracting party. "The mistake was a result of a *bona fide* mutual error, alternatively an intentional act of the Plaintiff."[8]

The second defense: "Tacit term of the written agreement/contract not complied with"

1. The defendant pleads that in the event it being found that the agreement was not entered into between the plaintiff and Silkblaze; it is the case for CSN that before the parties entered into the contract it was well-known to the UFS that CSN is a supplier of nutrition to among others, wholesalers, retailers and third parties worldwide. Further, that the UFS, being a university, would test the aforementioned products and confirm that the product is of the highest standard as prescribed by the applicable standards as well as applicable law to enable CSN to distribute and sell the nutritional supplements.
2. It was therefore in the contemplation of the parties that the University would be properly accredited to do the contracted tests and as such be recognized not only in South Africa; but worldwide.
3. It was a tacit agreement that the University's laboratory is duly accredited and registered to do the test it undertook.
4. It is denied by CSN that the University complied with the written agreement; it is not accredited to do the periodic evaluations and inspections and determine the quality of the product on an international standard.

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7 Bundle "Index" dated 13 April 2022 at pages 31 to 37.

8 Paragraph 2.5 of the Defendant's Plea.

5. The above resulted in CSN's international contracts to be cancelled.
6. CSN had to appoint an internationally accredited entity to do the quality control testing.

[10] The Law of Contract in South Africa has come a long way and we have slowly but surely moved into the era wherein legal certainty in the South African common law of contract promotes constitutional visions in order to stabilise a fragile democracy and economy.[9]

[11] On signing a contract, the parties become servants to the terms thereof and they acknowledge and concede to the Law of Contracts. (The principle of *pacta sunt servanda* decrees agreements, freely and voluntarily concluded, must be honoured.) They pledge themselves to the Rule of Law and an open and democratic society based on human dignity, equality and freedom; constitutional integrity within the facts and circumstances of their case.

[12] Parties to a contract are barred from believing themselves to be above the law and the contract they committed to. Integrity is vital to ensure business efficacy and democratic commercial certainty and security. Lawlessness will have punitive repercussions. Anarchistic parties must accept the legal consequences of non-compliance to contracts; rogue arrogance towards law and contract shall not be tolerated by courts.

[13] That said; the courts must act with perspective restraint. Parties are servants to the contract, not slaves. If the facts are clear, courts may stray from *pacta sunt servanda*. The principle of *ubuntu* forms the core of contracts. *Ubuntu* "provides a particularistic context in the law of contract when, for example, addressing the economic positions or bargaining powers of the contracting parties".[10]

[14] I would add that aside from the idiosyncrasies parties often commit and cause, the adjudication of a case must acknowledge a need for understanding not vengeance, *ubuntu*

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[9] 2021: Ali, F, *The importance of legal certainty in the South African common law of contract in promoting the constitutional vision*, https://uir.unisa.ac.za/bitstream/handle/10500/28092/dissertation_ali_f.pdf?sequence=1&isAllowed=y. (Date of use: 1 July 2022).

[10] *Beadica 231 CC and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC) at paragraph [208].

and not victimization of parties; a court should do simple justice between citizens. This is easier said than done. The above was decreed in the cases referred to hereunder.

[15] The Law of Contracts was stated through the years to be the following:

1. In *Basson v Chilwan and others* 1993 (3) SA 742 (A) at 762H Eksteen JA referred to: “The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible …” Further, “if there is one thing that is more than public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract.”
2. Justice Ackermann in *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at paragraph 26 described it as “a central consideration in a constitutional state. These statements aim for reasonable certainty, so that parties can go about their business knowing the rules of the game; constitutional economic integrity is vital.”
3. Moseneke J (as he then was) pointed out in his dissent in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paragraph 98 that: “Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties.”
4. In *Beadica 231 CC and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC) (“Beadica 231 CC”) an intricate academic researched exposé was given on the modern Constitutional Law of Contract in South Africa to guide courts in the adjudication of these matters. It was concluded that the impact of the Constitution on the enforcement of contractual terms through the determination of public policy was profound. As was stated in Barkhuizen, it required that courts employ (the Constitution and) its values to achieve a balance that strikes down the unacceptable excesses of freedom of contract, while seeking to permit individuals

the dignity and autonomy of regulating their own lives. Public policy imported values of fairness, reasonableness, justice and *ubuntu*.

5. *Pacta sunt servanda* (agreements must be kept) and "perceptive restraint" must be balanced on the facts of the case. Nonfulfillment of the *pacta sunt servanda* should only be in the clearest of cases and as Victor AJ stated:

> [231] This approach leaves space for courts to scrutinize contractual autonomy whilst at the same time allowing courts to refuse enforcement of contractual terms that conflict with constitutional values, even though the parties may have consented to them. Public policy must take all these considerations into account and not implement contractual autonomy at the expense of transformative constitutionalism. The appropriate balance can readily be achieved upon a recognition of an 'underlying moral or value choice' in which the constitutional values of *ubuntu* feature in this constitutionally transformative space.

6. *The onus is on the party that claims a court must deviate from the pacta sunt servanda to proof that the facts of the case justify this grave divergence.*

[16] I attached the written agreement to show that the citing of the parties was clear and unambiguous. The acronym "CSN" is on the cover page of the written agreement. It is explained in clause 1.2: "CHRISTO STRYDOM NUTRITION, ID 5801115065084, 31 Kimberley Road, Bainsvlei, Bloemfontein ("CSN")."

[17] More so, the acronym "CSN" was used about 67 times in the written agreement. The claim by CSN that the contracting parties are the University and Silkblaze 11 (Pty) Ltd is unbelievable on the face of the written agreement.

[18] In clause 2; "Recordal", it is stated that: "2.1 CSN is a supplier of nutrition supplements as listed in the schedules hereto and is desirous to make use of the UFS seals ("Seals").

[19] At clause 2.3 "Seals" is described to mean: ""As tested by the UFS laboratories", together with the UFS logo, as approved by the Department of Marketing." There can be no ambiguity that the agreement *does not* include any specific national or international accreditation; it is as tested by the UFS laboratories and as approved by the Department of Marketing. Clause 4.2 refers to the "… standards prescribed by the UFS, …"

[20] The written agreement consists of 17 clauses and the word "international" or implication of internationality do not feature anywhere. The alleged tacit term averred is specifically excluded from any operation or legal consequence between the parties in, for instance, clauses 2, 11 and 12.

[21] Christo Strydom may have botched the negotiations and the agreement when he failed to demand the now commanded terms be in the written agreement. He will have to carry the responsibility and consequences of the reality that eventuated, not the University. He was on an equal footing with the University during the signing of the written agreement and is not a frail participant. As said; he seems to be an experienced, knowledgeable and international businessman. The written agreement could not be clearer.

[22] It will be a travesty of justice to allow the matter to go to trial. The prejudice to the excipient is clear; it will be a waste of resources of which time and money count for the most. As pointed out; the law is that an exception is a valuable part of the system of procedure. Its principal use is to raise and obtain a speedy and economical decision on questions of law which are apparent on the face of the facts in the pleadings.

[23] There is nothing more to do by the excipient than to produce the written agreement and it speaks for itself. It is valid and constitutionally enforceable as it is. The defenses averred by CSN are bad in law in comparison.

[24] Apart from the above; clause 10 decrees that should any dispute arise between the parties to this agreement with regard to the interpretation, implementation, execution or termination of this agreement, such shall be submitted to arbitration. It seems as if this was not complied with by CSN in terms of the agreement. Litigation in the High Court on the defense itself of CSN may thus be premature and illegal in terms of the written agreement.

[25] The defendant's plea is bad in law, without merit and not trailable without severe prejudice to the excipient and the administration of justice.

[26] ORDER

1. The exception is upheld with costs on both defenses.
2. The respondent/defendant[11] is granted leave to amend the pleadings to remove the cause of complaint(s)/exception(s) within fifteen (15) days of the granting of this order, failing which, leave is granted to the excipient/plaintiff[12], after proper notice to the respondent/defendant, to apply for judgment on the claim in the main action.

M OPPERMAN, J

11 CSN.

12 The University of the Free State.

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ADDENDUM
JUDGMENT
CASE NO: 2433/2019
(AGREEMENT DATED 17 SEPTEMBER 2015)