

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 41445 /2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER
JUDGES: NO
(3) REVISED. NO

SIGNATURE DATE: 11 July
2022

TSHISEVHE GWINA RATSHIMBILANI INCORPORATED
(Registration Number: 2011/006563/21)

Plaintiff / Applicant

And

GIJIMA HOLDINGS (PTY) LTD
(Registration Number: 1998/021835/07)

Defendant/ Respondent

Coram: Nichols AJ

Delivered: 11 July 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *Caselines* and by release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 11 July 2022.

JUDGMENT

NICHOLS AJ

Introduction

[1] This is a matter in which the plaintiff, Tshisevhe Gwina Ratshimbilani Inc, a law firm, instituted action against its erstwhile client, Gijima Holdings (Pty) Ltd, for outstanding legal fees. For ease of reference, I shall refer to the parties as the plaintiff and defendant respectively.

[2] The defendant raised exceptions to the plaintiff's particulars of claim as disclosing no cause of action and being vague and embarrassing. The plaintiff instituted a formal application in terms of rules 28(1) and 28(4) to amend its particulars of claim following delivery of the defendant's notice of objection to its notice of intention to amend its particulars of claim. The defendant opposes this application to amend the particulars of claim.

[3] The parties have agreed that I adjudicate and determine the merits of both the plaintiff's application to amend its particulars of claim and the defendant's exceptions. Amendments that have the effect of rendering pleadings excipiable, or which do not cure excipiable pleadings will not be allowed.¹ I shall therefore consider the applications holistically; approach the application for leave to amend as if on exception and if the particulars of claim incorporating the amendments are not excipiable, the application for leave to amend must be granted, and the exceptions dismissed.

The issues

[4] The main issue for determination is whether the plaintiff's particulars of claim, as sought to be amended, discloses a cause of action, which has been pleaded with sufficient particularity and clarity to sustain its cause of action for the payment of legal fees in terms of the written mandate concluded by the parties.

The pleadings and notices

[5] The plaintiff's amended particulars of claim allege:

(a) A written mandate between the parties regarding the provision of specific professional legal services to the defendant in relation to a specific and described scope of work. A copy of the written mandate is annexed to the particulars of claim and the material express terms of the written mandate are set out in the particulars of claim.

¹ *YB v SB* 2016 (1) SA 47 (WCC) para 11.

(b) In accordance with these material express terms, the plaintiff alleges that it agreed to perform the due diligence investigation aspect of the scope of works for a capped fee of R850 000. Fees would be payable immediately upon presentation of an invoice. It would be entitled to increase its fee if requested to carry out additional tasks or if forced to spend more time on the matter due to unforeseen factors beyond its control and such increased fee was discussed with the defendant.

(c) That the plaintiff was in fact required to charge an increased fee due to unforeseen factors beyond its control. These factors included, inter alia, an increase in the scope of services; outstanding information from the target group; and information being provided to it in separate data rooms. These factors resulted in the provision of additional professional legal services and the concomitant increase in legal fees beyond the capped fee amount for the due diligence investigation.

(d) That in accordance with the written mandate, the plaintiff kept the defendant abreast of these developments as they occurred and the fact that it would result in the unavoidable and necessary increase in its legal fees. Further that the defendant raised no objection in this regard.

(e) Its tax invoice dated 28 August 2020, for R1 103 454.21 (incl vat), included the increased fee amount in respect of the due diligence investigation. It was presented for payment to the defendant and dishonoured by non-payment. A copy of this invoice is annexed to the particulars of claim and represents the amount claimed from the defendant.

(f) That it complied with its obligations in terms of the written mandate by, inter alia, rendering its professional legal services to the defendant in accordance with the scope of work described in the agreement; describing the professional legal services rendered with sufficient particularity in the narrative and descriptions in its tax invoice dated 28 August 2020; and further informing the defendant of the factors that necessitated the resultant increase in the fee.

[6] The purpose and effect of the amendments, as explained by the plaintiff, are to clarify the reasons for the plaintiff's deviation from charging the agreed capped fee for the due diligence investigation aspect of the scope of works for the professional legal services rendered, and to position such deviation within the terms and conditions of the written mandate.

[7] The defendant has advanced essentially the same grounds for both the exception that the particulars of claim, do not disclose a cause of action and the exception that the particulars of claim are vague and embarrassing. It was contended that the exceptions, which where they overlap on the same point but seek different outcomes, are to be treated in the alternative. It argued that where the particulars of claim allege sufficient material to support the elements of a cause of action, but certain portions of that material are conclusions instead of factual allegations, then the particulars of claim will be excipiable.

[8] The defendant's notice of exception on the ground that the particulars of claim lack averments to sustain a cause of action was delivered on 5 February 2021. The relief sought is for the plaintiff's claim to be struck out.

[9] The defendant contends that the plaintiff broadly alleges compliance with the written mandate when a deviation is envisaged but fails to allege the specific facts, terms, and conditions that are required for compliance with clause 5.5 of the written mandate, which regulates the manner in which a party may deviate from the agreed fixed fee. Mr Clark, who appeared on behalf of the defendant, argued that legal services involving an increase in fees could only be performed after discussion with the defendant and provided such discussion, resulted in newly agreed written arrangements.

[10] Paragraph 17 of the amended particulars of claim, is specifically attacked as failing to disclose facts necessary to sustain a cause of action in compliance with clause 5.5 of the written mandate. Mr Clark contends that the bald averment of compliance with clause 5.5 amounts to a legal conclusion as opposed to facts that disclose a cause of action. Accordingly, Mr Clark submitted that the amendment will not cure the defect to the particulars of claim raised by the defendant's exception that the particulars of claim do not disclose a cause of action.

[11] The defendant's notice in terms of rule 23(1)(a) to remove cause of complaint was delivered on 5 February 2021. This notice informed the plaintiff of the defendant's intention to except on three identified grounds, which each assert that the particulars of claim are vague and embarrassing. It afforded the plaintiff an opportunity of removing these causes of complaint within 15 days. This notice is a precursor to an exception.²

[12] The defendant's exception pursuant to this precursor was delivered on 6 April 2022 subsequent to the institution of the of plaintiff's application to amend its particulars of

² *Hill NO v Brown* (3069/20) [2020] ZAWCHC 61 (3 July 2020) para 8.

claim. It avers that the plaintiff's notice of intention to amend failed to remedy the identified causes of complaint and it is an exception upon the grounds set out in the defendant's notice dated 5 February 2021. The relief sought is for the particulars of claim, alternatively such portions thereof that relate to charges contemplated by clause 5.5 of the written mandate to be struck out with the plaintiff to pay the costs.

[13] Although the defendant's exception asserts that the proposed amendment will not remove its causes of complaint and the plaintiff's particulars of claim will remain vague and embarrassing, it does not specify the grounds for this assertion vis-à-vis the proposed amended particulars claim.

[14] However, I am enjoined to consider exceptions sensibly since they provide a useful mechanism to weed out cases lacking legal merit.³ Therefore, pursuant to the approach that I have adopted, to consider the application for amendment as if on exception, I shall consider the defendant's notice of objection to the plaintiff's application to amend, since the objections from paragraph 6 to 11 encapsulate the defendant's specific contentions that the amended particulars of claim will remain vague and embarrassing. These paragraphs read as follows:

'6. *in proposed paragraph 16 of the plaintiffs notice of intention to amend, to be inserted by paragraph 3 of such notice, the plaintiff alleges, insofar as is material, that:—*

"16 the overrun constituted a deviation from the assumption set out in paragraph 5.7 of the agreement and resulted in the carrying out of additional tasks by the plaintiff, an increase in the actual time spent by the plaintiff and ultimately an increase of the plaintiff's fees, due to unforeseen factors or factors beyond the plaintiff's control, as envisaged by clause 5.5 of the agreement which additional tasks, inter alia, consisted of the following",

whereafter, in proposed sub-paragraphs 16.1 to 16.5, the matters alleged to be envisaged under clause 5.5 of the agreement are set out;

7. *proposed sub-paragraphs 16.1 to 16.5 does not profess to set out all of the relevant matters but, by use of the words "inter alia", only some of them;*

8. *accordingly, the amendment will introduce vague and incomplete allegations;*

9. *in proposed paragraph 22 of the particulars of claim, to be inserted by paragraph 7 of the plaintiff's notice of intention to amend, the plaintiff alleges that it complied with its*

³ *Telematrix (Pty) Ltd v Advertising Standards Authority SA* (459/2004) [2005] ZASCA 73; [2006] 1 ALL SA 6 (SCA) (9 September 2005) para 3.

obligations in terms of the agreement by, inter alia, rendering its professional legal services to the defendant in accordance with the scope of works described in the agreement, as set out with sufficient particularity in the descriptions in the invoice attached as annexure "TGR4", and further informing the defendant of the overrun and the resultant increase in the estimated fees;

10. *the proposed paragraph 22 of the particulars of claim:-*

10.1 *by use of the words "inter alia" does not allege all of the matters relevant to the claim by the plaintiff that it duly complied with its obligations; and*

10.2 *fails to allege, as is required, that the fees were incurred in accordance with newly agreed arrangements concluded between the parties; and*

11. *accordingly, if the amendment is granted, the particulars of claim will be excipiable alternatively, vague and embarrassing.'*

[15] Mr Clark argued that even if granted, the proposed paragraphs 16 and 22 still have the effect of rendering the particulars of claim excipiable, alternatively vague and embarrassing. He contended that the purpose of the capped fee was to reduce the defendant's legal costs. This Court is entitled to interpret the written mandate, on exception because the entire mandate is before the court. Such exercise does not require additional evidence and from a plain interpretation of clause 5.5, it is clear, he argued, that the particulars of claim do not set out the factual requirements required to sustain a cause of action based on an overrun.

[16] He concluded by contending that the defendant would be prejudiced if the amendment is granted. It will be forced to face a trial where the plaintiff has no claim, alternatively has evaded demonstrating the weakness of its claim by its vague and embarrassing particulars of claim.

[17] Miss Olivier, who appeared for the plaintiff, argued that the nub of defendant's objections to the plaintiff's particulars of claim are matters to be determined by evidence that do not pertain to cause of action and do not render the particulars of claim excipiable. She contended that the defendant has incorrectly interpreted the written mandate and is now asking this Court to adjudicate upon and interpret clause 5.5 to determine whether a contract exists between the parties. It was submitted that the exception on cause of action does not raise as a ground that a discussion and then written agreement was required for there to be compliance with clause 5.5. Accordingly, the necessary averments have been pleaded to sustain a cause of action.

[18] Miss Olivier highlighted that neither the notice to remove the cause of complaint nor the exception on the ground of the particulars of claim being vague and embarrassing identify or raise any prejudice. She argued that the issue of prejudice was only addressed in response to query by this Court. Even then, the only prejudice raised was that the defendant would be obliged to run the trial. She submitted that this hardly counted as proper or serious prejudice.

[19] She contended that the defendant is simply trying to delay filing a plea and the finalization of the claim because it has no defence to the claim. The issues of whether there has been proper compliance with the provisions of clause 5.5 is a matter for evidence.

The law and discussion

[20] The relevant portions of rule 28 provide as follows:

'28(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(4) if an objection which complies with sub-rule (3) is delivered within the period referred to sub-rule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

[21] It is trite that a party may seek to amend its pleadings at any time before judgment has been granted in a matter. The party seeking an amendment bears the onus of showing that it is made bona fide and there is an absence of prejudice.⁴ The tendency of our courts is to allow an amendment unless it is mala fide or the amendment will cause an injustice to the other party that cannot be cured by an appropriate order for costs.⁵ A court considering an application for an amendment has a discretion whether to grant or refuse the application and must exercise this discretion judicially.⁶

[22] As mentioned at the outset, amendments that have the effect of rendering such pleading excipiable or where it does not cure an excipiable pleading, will not be allowed. I turn therefore to consider the relevant principles governing exceptions, which are relevant

⁴ *Krische v Road Accident Fund* 2004 (4) SA 358 (W) at 363.

⁵ *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2020 (1) SA 327 (CC) para 89; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at 261C–D.

⁶ *YB v SB* 2016 (1) SA 47 (WCC) para 9.

to an assessment of the grounds of objection to the amendments sought, and the exceptions.

[23] The starting point is the court must accept as correct the allegations contained in the particulars of claim, incorporating the proposed amendment, and determine whether those allegations are capable of supporting a cause of action in respect of the plaintiff's claim.⁷

[24] The defect on the pleadings must appear ex facie the pleadings and no extraneous facts may be adduced to show that the pleading is excipiable.⁸ The onus rests on the excipient to show that the pleading is excipiable on every possible interpretation that can reasonably be attached to it.⁹

[25] It is common cause that the plaintiff is a law firm and that it seeks payments of its alleged outstanding fees pursuant to the written mandate concluded between the parties. The issue between the parties, as far as the exceptions are concerned, turns on the interpretation of the written mandate and particularly clause 5.5 of the mandate. The defendant contends that the amended particulars of claim discloses no cause of action alternatively is vague and embarrassing.

[26] The defendant is therefore required to show that the plaintiff's claim is bad in law on the pleadings as sought to be amended, and further that clause 5.5 of the written mandate cannot reasonably bear the meaning and interpretation contended for by the plaintiff.¹⁰

[27] The factual requirements for a cause of action have been authoritatively stated as the facts required by a plaintiff, which it would be necessary to prove, in order to support its right to judgment.¹¹ The relationship between an attorney and his client is one of mandate.¹² In *Mucavele v Health MEC Mpumalanga*¹³, Legodi JP commented on the longstanding norms and practices for the conclusion of a valid and enforceable mandate.

⁷ *Stewart and Another v Botha and Another* 2009(6) SA 310 (SCA) para 4.

⁸ *Barnard v Barnard* 2000(3) SA 741(C) para 10.

⁹ *First National Bank of Southern Africa Limited v Perry NO and others* 2001 (3) SA 960 (SA) at 965 C-D.

¹⁰ *Trustees, Bus Industry Restructuring Fund v Break Through Investments CC & others* 2008 (1) SA 67 (SCA) para 11.

¹¹ *McKenzie v Farmers' Cooperative Meat Industries Ltd* 1922 AD 16 at 23; *Evins v Shield Insurance Co Ltd* 1980 (2) 814 A at 825G.

¹² *Mort NO v Henry Shields-Chiad* 2001 (1) SA 464 C.

¹³ *Mucavele v Health MEC Mpumalanga* (3352/2016) [2022] ZAMPMBHC 33 (16 May 2022).

These are that a client should be informed of the scope of work to be undertaken by the attorney, the fee amount, hourly rate, payment terms and what would happen when a mandate is terminated.¹⁴ Unless agreed to otherwise, the attorney is not entitled to payment of his fees and/or disbursements until he has performed his mandate or until his services have been terminated.¹⁵

[28] A plaintiff is required to allege in the pleadings the material facts upon which it relies.¹⁶ For a claim based on a written agreement, the plaintiff is obliged by reference to all the clauses upon which it relies for its cause of action, to set out the terms that it relies upon to found its claim against the defendant.¹⁷ An exception can only be granted where no cause of action is made out on every interpretation emanating from the pleading being excepted against. It is for the excipient to satisfy the court that the conclusion of law pleaded by the plaintiff cannot be supported by any reasonable interpretation of the particulars of claim.¹⁸

[29] In this matter, a copy of the written mandate is annexed to the particulars of claim. It runs to 13 pages and sets out in detail the scope of work to be undertaken by the plaintiff, the fee for its services and the hourly rates of the attorneys working on the transaction. The amended particulars of claim also specifies the material express terms from the written mandate in paragraphs 8, 9, 11, 12 and 13.

[30] The allegations regarding the plaintiff's compliance with the terms of the written mandate and the defendant's breach have been pleaded in a lucid and logical fashion. The plaintiff has set out the reasons for its deviation from the capped fee amount and these facts are prima facie in accordance with the written mandate entitling it to claim the legal fees sought. The nature of the legal services provided is apparent from the narrative to the tax invoice, as are the details of the attorneys who rendered the services and the time spent by each. The plaintiff's detailed allegations in the amended particulars of claim are amplified by the factual averments reflected in the annexures.

[31] I am accordingly, of the view that the defendant has not shown that the plaintiff's claim is bad in law. It has not dispelled, on exception, that the facts pleaded do not bear

¹⁴ *Mucavele* ibid at para 8.

¹⁵ *Goodricke & Son v Auto Protection Insurance Co Ltd (in Liquidation)* 1968 (1) SA 717 (A) at 722-723.

¹⁶ *Minister of Safety & Security v Slabbert* [2009] ZASCA 163 [2010] 2 ALL SA 474 SCA para 11.

¹⁷ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107 B-H.

¹⁸ *Trustees for the time being of the Childrens' Resources Centre Trust & Others v Pioneer Food (Pty) Ltd & Others (Legal Resources Centre as Amicus Curiae)* [2013] 1 ALL SA 648 (SCA) para 36.

the meaning contended for by the plaintiff which is that its cause of action is based on the written mandate; and that in order to claim fees over and above the agreed capped amounts, it was required to inform the defendant of the unforeseen factors requiring additional legal services and that such factors would result in an increased legal fee.

[32] An exception is a pleading and the excipient is bound by the terms in which it is framed or by the issues it raises.¹⁹ The exception that the amended particulars of claim does not disclose a cause of action is premised on the basis that clause 5.5 required the plaintiff to discuss any increase in the fees with the defendant at the earliest opportunity, and thereafter proceed with the work on the basis of newly agreed arrangements.

[33] Those averments are set out in the amended particulars of claim. The argument that clause 5.5 required a new written agreement setting out the terms of the new arrangements was advanced for the first time in argument before this Court. Regardless, a plain reading of clause 5.5 in the context of the pleadings as a whole does not support the defendant's argument that the only possible interpretation is the parties were required to conclude a new written agreement setting out the terms of the new arrangements.

[34] Exception proceedings are not the correct proceedings for the defendant to advance and ventilate that argument since it is apparent that evidence will be required for a proper determination of that issue and whether or not the parties intended a new written agreement was required before the plaintiff could perform the additional legal services or claim its fees for those additional legal services.²⁰ Those issues are more appropriately to be determined by the trial court on evidence before it.²¹

[35] An exception on the ground that a pleading is vague and embarrassing involves consideration whether it lacks particularity to the extent that it is vague; and whether the vagueness causes embarrassment to the extent that the excipient is prejudiced.²² The excipient must show a real point of law or real embarrassment and not mere conjecture of vague and embarrassment in order for the exception to be upheld.²³ An exception that a pleading is ambiguous cannot succeed unless, on every interpretation possible, no cause

¹⁹ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 898F – 899A.

²⁰ *Gordon Lloyd Page and Associates v Riviera & another* 2001 (1) SA 88 (SCA) 95J; *Picbel Groepvoororgfonds (in liquidation) v Somerville & others* 2013 (5) SA 496 (SCA) para 39.

²¹ *Gordon Lloyd Page and Associates v Riviera & another* 2001 (1) SA 88 (SCA) at 95J;

²² *Steve's Wrought Iron Works and Others v Nelson Mandela Metropolitan Municipality* para 24.

²³ *South African National Parks v Ras* 2002 (2) SA 537 (C) at 542.

of action is disclosed.²⁴ The onus is upon the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.²⁵

[36] The dicta of Heher J in *Jowell v Bramwell-Jones*²⁶ is apposite, where the court held:

'When the lack of particularity relates to mere detail, the remedy of the defendant is to plead to the averment made and to obtain the particularity he requires: (i) either by means of discovery/inspection of document procedure in terms of the Rules; or (ii) by means of a request for particulars for trial of those particulars which are strictly necessary to enable the defendant to prepare for trial...

*[a] an exception that the pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded; whereas (b) Rule 30 may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity; it is not necessary that the failure to plead material facts goes to the root of the cause of action. It is therefore incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it. The attacks mounted by the defendants that the particulars of claim are vague and embarrassing cannot found on the mere averment that they are lacking in particularity. This might, depending on the circumstances, allow an application in terms of Rule 30. An allegation that a pleading is vague and embarrassing is far more serious than a complaint about particulars. Furthermore, in approaching these exceptions, I shall bear in mind the following general principles: (a) minor blemishes are irrelevant; (b) pleadings must be read as a whole; no paragraph can be read in isolation; (c) a distinction must be drawn between the *facta probanda*, or primary factual allegations which every plaintiff must make, and the *facta probantia*, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence;...'*²⁷

[37] This reasoning may be applied to the defendant's contentions that the amended particulars of claim are vague and embarrassing. The defendant's criticism of paragraph 16 and 22 are without merit. The additional factual averments sought are firstly evident from the pleadings and the annexures to the pleadings. Secondly, where it contends that they are not, the failure to plead those factual averments does not strike at the root of the

²⁴ *South African National Parks* ibid at 540.

²⁵ *Francis v Sharp and others* 2004 (3) SA 230 (C) at 240.

²⁶ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W).

²⁷ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 902C-903A.

cause of action when the amended particulars of claim are considered holistically. The factual averments sought do not constitute the primary factual allegations required to sustain a cause of action. They are, properly considered, the *facta probantia*, which are secondary allegations upon which the plaintiff will rely in support of its primary allegations.

[38] I am of the view that the specific particularity required by the defendant does not affect its ability to plead to the averments in the amended particulars of claim. It has not advanced any reason that may be considered as constituting serious prejudice thereby entitling it to an expungement of the entire or part of the amended particulars of claim. The defendant retains its recourse in terms of the Uniform Rules of Court to seek further particularity to enable it to prepare for trial.

Conclusion and Order

[39] I am mindful that the primary object of allowing an amendment is for the proper ventilation of the dispute between the parties in order to determine the real issues between them so that justice may be done.²⁸

[40] Having considered the pleadings as a whole, I am of the view that the plaintiff has pleaded a complete cause of action, which identifies the issues it seeks to rely on, and on which evidence will be led. The defendant's exceptions that the amended particulars of claim do not disclose a cause of action and /or are vague and embarrassing are without merit. The defendant has not established that it would be seriously prejudiced if its exceptions are not upheld.

[41] In the result, I make the following order:

- (a) the plaintiff's application for leave to amend the particulars of claim dated 1 April 2021, is granted with costs.
- (b) the plaintiff is directed to file the amended particulars of claim within ten days of the date of this order.
- (c) the defendant's exceptions are dismissed with costs.

²⁸ *YB v SB* 2016 (1) SA 47 (WCC) para 11.

T NICHOLS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

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