

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2021/55816

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

DATE

SIGNATURE

In the matter between:

ESTATE LATE FRANS KRUGER NO

Plaintiff/Respondent

and

QUESTEK HOLDINGS (PTY) LTD

First Defendant/ Excipient

**QUESTEK ADVANCED TECHNOLOGIES (PTY)
LTD**

Second Defendant/ Excipient

GEORGE VAN GILS

Third Defendant/ Excipient

DANIEL CHRISTIAAN PRETORIUS

Fourth defendant/ Excipient

Heard on:

6 March 2023

Delivered on:

24 March 2023

JUDGMENT

WESLEY AJ:

[1] The plaintiff has issued summons against the defendants for payment of various amounts identified in the particulars of claim. The defendants except to the plaintiff's particulars of claim alleging that they do not disclose a cause of action. For convenience, in this judgment I refer to the parties as in the action.

[2] The plaintiff has pleaded in the particulars of claim:

[2.1] in paragraph 30, that in January 2021 the plaintiff and the defendants entered into arbitration proceedings;

[2.2] in paragraph 33, that the contents of the statement of claim in the arbitration "*mimic the content of this summons*", and that the claims in the two are identical;

[2.3] in paragraph 35, that "*the arbitration proceedings have since been suspended*" by the arbitrator, as appears from correspondence attached to the particulars of claim.

[3] The defendants contend in the exception that these allegations reflect that "*the claims pursued by the plaintiff in the arbitration (and in the particulars of claim) [have] been suspended and are unenforceable*". The heads of argument delivered on behalf of the defendants in this exception confirm that the defendants' case is that "*the parties had agreed to suspend the adjudication of the claims pursued by the plaintiff in the particulars of claim*" (my underlining).

[4] The defendants contend that the particulars of claim therefore disclose a defence to the claims, being an agreement to suspend the adjudication of the claims, including by way of this action.

[5] The plaintiff denies that this is the proper interpretation of the agreement pleaded in the particulars of claim. The plaintiff asserts that the agreement was limited to the arbitration proceedings and does not apply to any other proceedings that might be launched by the plaintiff, such as this action.

[6] The plaintiff contends further that the contents of the agreement in any event could not found an exception to the particulars of claim because the defence the defendants claim arises from that agreement does not relate to any part of the plaintiff's cause of action.

The test on exception

[7] The test on exception in relation to allegations of fact is well settled. It has recently been summarised by the Constitutional Court in **Pretorius and Another v Transport Pension Fund and Others** 2019 (2) SA 37 (CC) at [15] as follows:

“In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts.”

The merits of the exception

[8] For the purposes of the exception, I must accept that the allegations in the particulars of claim are true. The agreement the defendants rely on is pleaded in paragraph 35 as follows:

“35. The arbitration proceedings have since been suspended by the arbitrator, being Honourable Judge Bertelsmann, with the correspondence confirming this suspension attached hereto and marked as ‘POC6’.”

[9] The plaintiff does not therefore plead that the agreement was to suspend the claims, only the arbitration proceedings. This is what the correspondence attached to the particulars of claim itself says. That correspondence records that the agreement is that “*the arbitration proceedings*” should be suspended.

[10] The defendants contend that I should employ the ordinary principles of contractual interpretation, including having regard to the context in which the agreement was concluded, to interpret the phrase “*arbitration proceedings*” in the correspondence to mean broadly the adjudication of the claims referred to arbitration. This is not the Court’s function at exception stage. I must, for purposes of the exception, accept the plaintiff’s pleaded version as to the content of the agreement. On that version, the agreement was only to suspend the arbitration proceedings.

[11] It may be that the defendants can assert as an objection to the present summons that the plaintiff is not entitled to pursue the claims in court since they are already the subject of arbitration proceedings. But that is not what the defendants have raised in this exception. The defendants contend in this

exception that the actual agreement pleaded by the plaintiff in the particulars of claim in terms suspends the claims of the plaintiff.

[12] The defendants' exception must therefore be dismissed.

[13] In the circumstances, it is not necessary for me to consider the plaintiff's second contention, that the contents of the agreement in any event could not form the basis of an exception to the particulars of claim because they do not relate to any part of the plaintiff's cause of action.

Costs

[14] The parties were agreed that the unsuccessful party should be ordered to pay the costs of the application.

[15] The plaintiff sought an order of costs on the attorney client scale against the defendants, on the basis that the exception was vexatious and an abuse of process. It is well settled that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant, in particular fraudulent, dishonest or bad faith conduct, vexatious conduct or conduct that amounts to an abuse of the process of court.

[16] I do not consider that the defendants' conduct in this matter meets this threshold. Although I have found that the exception must be dismissed, there is no reason for me to doubt the defendants' *bona fides* in objecting to the plaintiff's referral to the High Court of claims that were the subject of pending arbitration proceedings that the parties had only recently agreed to suspend. Nor do I consider that the Court should mark special disapproval of the manner in which the defendants sought to raise their objection. In the circumstances, in my view it would not be appropriate to make a special order of costs.

Order

[17] I make the following order:

1. The exception is dismissed;
2. The defendants are ordered to pay the plaintiff's costs, jointly and severally, the one paying the other to be absolved.

MA WESLEY
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be **24 March 2023**.

Appearances:

Counsel on behalf of the plaintiff/respondent: A Bishop

Instructed by: Andre Pienaar & Associates (APA Africa)

Counsel on behalf of the defendants/excipients: N Horn

Instructed by: Smit Sewgoolam Inc