IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 51959/2021

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

…….……..... …….

SIGNATURE **DATE**

In the matter between:

KPMG SERVICES SA LIMITED EXCIPIENT/DEFENDANT

And

BETAPOINT MANAGEMENT CONSULTANTS (PTY) LTD RESPONDENT/PLAINTIFF

JUDGMENT

SENYATSI, J

[1] **This is an exception application brought by KPMG (excipient/defendant) in respect of the particulars of claim to the summons issued by Betapoint (respondent/plaintiff). In the main action, Betapoint seeks payment from KPMG for the fees it alleges are owed to it for services rendered to KPMG pursuant to a written agreement.**

[2] **In terms of the written agreement which related to what the parties called KPMG's Real Estate Optimisation Project, Betapoint was to review KPMG's existing leases at its offices throughout South Africa and recommend appropriate interventions to reduce the costs associated with those leases, such as exiting the leases, renegotiating the leases, conducting subleases, mothballing the premises and the like. The services fell under the "Transaction Stream" in the category of the written agreement.**

[3] **KPMG filed a notice of appearance to defend which was followed by a notice of exception, raising three grounds of exception.**

First Ground of Exception

[4] **KPMG contends that Betapoint's claim ("Claim A") is premised on a written agreement, being a Job Arrangement Letter ("JAL"), comprising of the statement of work and Betapoint's Terms of Business ("Terms of Business"). The JAL is attached to the particulars of claim as annexure "POC1".**

[5] **Clause 7 of the JAL sets out the fees and expenses that KPMG, as the client, agreed to pay Betapoint. The relevant portion of clause 7 of the JAL reads as follows:**

> "The determination of the value of any cost savings or transaction value, for purposes of determining the fee owing to Betapoint, will be agreed upon by the Parties prior to the presentation of a valid invoice. Should the Parties fail to agree on a value within 7 days, the dispute resolution process outlined in section 10 of our Terms of Business will be applied."

[6] **Section 10 of the Terms of Business is entitled "Dispute" and reads as follows:**

> "It is intended that, except for matters related to confidentiality or intellectual property rights, the parties shall first attempt to resolve any dispute or alleged breach internally by escalating it through management and, prior to pursuing litigation, use a mutually acceptable alternative dispute resolution process."

[7] **Betapoint's entitlement to any fees in terms of clause 7 under the JAL is accordingly dependent on an agreement being reached between the parties on the value of any cost savings or transaction value achieved by KPMG, failing which the dispute resolution process as contemplated by section 10 of the Terms of Business are to be applied.**

[8] **According to KPMG, clause 7 is an agreement to agree, and is void for vagueness and consequently unenforceable.**

[9] **KPMG contends furthermore that neither the JAL nor the Terms of Business identify any agreed upon deadlock breaking mechanism in the event that there is a dispute between the parties on the "value of any cost savings or transaction value". On the contrary, section 10 of the Terms of Business, to which clause 7 refers, contemplates a further agreement to agree-on an alternative dispute resolution process.**

[10] **Betapoint does not contend that any agreement has been reached in respect of the value of a new cost savings or transaction value in respect of the Transaction Streams deliverables for Johannesburg, Polokwane and Pretoria.**

[11] **In the result, so contends KPMG, Betapoint's claim for fees in respect of the Transaction Stream deliverables for Johannesburg, Polokwane and Pretoria as pleaded in paragraphs 25, 26 and 32, read with paragraph 38 of the particulars of claim fails to disclose a valid course of action and/or is bad in law and/or alternatively vague and embarrassing.**

Second Ground of Exception

[12] **KPMG contends that in paragraph 29 of the particulars of claim, Betapoint pleads that it was entitled to institute legal proceedings in this Court because their attempt to resolve the dispute over its fees had failed as contemplated in section 10 of the Terms of Business.**

[13] **Section 10 of the Terms of Business which Betapoint relies on is itself void for vagueness because it does not identify the alternative dispute resolution process to be followed by the parties in attempting to resolve the dispute in respect of Betapoint's fees. On the contrary, section 10**

contemplates a further agreement being reached and an acceptable alternative dispute resolution process to be followed by the parties.

[14] **Betapoint's entitlement consequently to have instituted legal proceedings in this court is dependent on compliance with a section in the Terms of Business which envisages a further agreement being reached between the parties and therefore results in Betapoint's claims failing to disclose a valid cause of action, alternatively, being bad in law and/or alternatively vague and embarrassing.**

Third Ground of Exception

[15] **In paragraphs 46 to 52 of the particulars of claim ("Claim B"), Betapoint claims, as an alternative to Claim A, an entitlement to a reasonable remuneration in respect of the Transaction Stream deliverables.**

[16] **KPMG contends that the claim appears to be premised on unjustified enrichment in respect of deliverables made under an agreement which Betapoint does not contend is void or of no force or not binding on it.**

[17] **In addition, none of the allegations necessary to satisfy any reliance on a claim for unjustified enrichment or any *condictio* have been pleaded.**

[18] **It follows, so contends KPMG, that Claim B fails to disclose a valid cause of action., alternatively lack the necessary averments to sustain a valid cause of action.**

[19] **KPMG furthermore contends that recognising that such a claim fails to disclose a valid cause of action, Betapoint pleads in paragraph 53 of the**

particulars of claim that the Court should develop the common law in terms of section 39 (2) and/or section 173 of the Constitution to recognise such a claim in order to promote the interest of justice, good faith, the right to dignity and the constitutional values of freedom, dignity and self-autonomy.

[20] **KPMG however contends that paragraph 53 does not rescue Claim B from lack of a cause of action because Betapoint fails to aver the necessary allegations in support of the development of the common law.**

[21] **In particular, so contends KPMG even further, no allegations are made to support the contention that the claim should be recognised to promote good faith, the right to integrity, the constitutional value of freedom, the constitutional value of dignity and the constitutional value of self-autonomy.**

[22] **Betapoint has merely pleaded a set of constitutional values in the absence of any facts to support any reliance thereon.**

[23] **In the result, Claim B is bad in law in that it fails to disclose a valid cause of action and/or alternatively is vague and embarrassing.**

Betapoint's contentions on the exceptions raised by KPMG

[24] **Betapoint contends that the first ground of exception that the JAL constitutes an unenforceable agreement to agree should be dismissed on several grounds, including that:**

a. **The JAL is a complete agreement in terms of which the parties have agreed upon the services to be delivered by Betapoint to KPMG based on a fee of between 10% or 15% of the cost savings generated**

by the deliverables by Betapoint for the benefit of KPMG. Betapoint contends that there is a dispute resolution process i in place with the agreement providing that the parties would seek a sensible way to avoid disputes. Betapoint contends that even if the JAL contains an agreement to agree, it is severable from the JAL as a whole, and that it may enforce the JAL irrespective of the enforceability of the agreement to agree.

b. **Properly and sensibly interpreted, the JAL contains a precise and agreed formula for determining the fees payable to Betapoint.**

c. **The JAL does not impose an agreement to agree. It imposes an administrative duty on the parties to seek to agree upon the quantum of the saved costs and transaction values which are used to derive the quantum of Betapoint's fees. Clause 7 does not purport to give either party the right to renegotiate Betapoint's entitlement to fees, nor purport to impose on either party the right to reach an agreement. It is simply not an agreement to agree.**

d. **If clause 7 is interpreted as imposing an agreement to agree, then it contains a deadlock breaking mechanism. This is not the dispute settlement process established in section 10 of the JAL. Betapoint contends that deadlocks are decided by reference to a determinable standard, namely, by calculating Betapoint's fees with reference to the actual cost savings or transaction value generated by Betapoint achieving the supply. Betapoint contends that the Court can do so by reference to the objective criteria fixed by the JAL and by reference to the baseline operating costs that the parties agreed upon at the outset of the JAL and the baseline lease agreements provided by KPMG to Betapoint. By reference to the terms of JAL, and to those documents, the Court is capable of determining and fixing**

Betapoint's fees, just like it would be capable of determining any other contractual obligation.

[25] **On the second ground of exception, that the pleadings are contradictory and the tacit term pleaded is irreconcilable with the JAL, should also be dismissed on the following grounds:**

a. **Firstly, so contends Betapoint, this ground of exception will not serve to reduce the material evidence that will be heard at trial.**

b. **Secondly, the pleadings are not vague and embarrassing. Claim B is pleaded in the alternative to Claim A and "in the event that it is held that on the express wording of the JAL that the parties did not agree upon a fee for the Transaction Stream Deliverables". KPMG is not embarrassed. It must lead to the case that, if it is correct that it's KPMG's fees have not been fixed by the express provision of the JAL, then there is a tacit term allowing Betapoint to recover for reasonable remuneration.**

c. **Thirdly, and relatedly, there is no contradiction between pleading a tacit term for reasonable remuneration on the assumption that there is no express term of the JAL relating to Betapoint's fees. The existence of an obligation on the parties to seek agreement on Betapoint's fees does not preclude the possibility of a tacit term for reasonable remuneration.**

[26] **Betapoint contends regarding the third ground of exception that the Claim C is contradictory and in addition the claim for the development of common law is unfounded, and should also be dismissed on the following grounds:**

a. **Firstly, the Claim C is not impermissibly contradicted by the allegations in support of Claims A and B. KPMG is not embarrassed. It can plead, so contends Betapoint.**

b. **Secondly, this ground of exception would not reduce any of the evidence that would have to be lead in relation to Claims A and B.**

c. **Thirdly, KPMG has not shown that it is "inconceivable" that a court would find that the common law development sought by Betapoint is appropriate. Quite the contrary, so avers Betapoint - the development of the common law proposed by Betapoint would promote the right and value of dignity, and the values of freedom, autonomy, and good faith. Furthermore, what matters regarding the development of common law is whether KPMG has been forewarned of Betapoint's intention to seek the development of the common law. Accordingly, so contends Betapoint, it is not appropriate to ventilate the development of common law at exception proceedings.**

Issues for determination

[27] **The issues to be determined are whether the averments in the particulars of claim are bad in law and/or alternatively, vague and embarrassing.**

The legal principles

[28] **In our law exceptions is regulated by the Uniform Rules of Court. Rule 23 (1) of the Uniform Rules states –**

"Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, 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."[1]

[29] **The rule clearly states that once the exception has been delivered, it may be set down for hearing within 15 days after delivery thereof. The use of the word "may" in the rule, is directory as opposed to peremptory.**

[30] **The exception is a pleading and not an application. In support of this principle, in *Steve's Wrought Iron Works and Others v Nelson Mandela Metro,*[2] Goosen J summed it up as follows:**

"…Rule 23 prescribes the form of the exception as a pleading. An exception is not an application to which the provisions of rule 6 apply."

It follows in my considered view that because the exception is a pleading as opposed to an application, it can therefore not lapse and the contention by the plaintiff that the exception has lapsed must fail.

[31] **In *Merb (Pty) Ltd v Matthews*[3] Maier-Frawley J made the following useful summary of some of the general principles applicable to exceptions -**

[1] Van Loggerenberg *Erasmus Superior Courts Practice* Service RS 21 (2023) at D1-293 ('*Erasmus Superior Court Practice*').
[2] 2020 (3) SA 535 (ECP) at para 21. See also the authorities cited therein.
[3] (2020/15069) [2021] ZAGPJHC 693.

"8. These were conveniently summarised by Makgoka J in Living Hands as follows:

'Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) 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.

(f) Pleadings must be read as a whole, and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.'

…

13. 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. The excipient must demonstrate that the pleading is ambiguous, meaningless, contradictory or capable of more than one meaning, to the extent that it amounts to vagueness, which vagueness causes embarrassment to the excipient." [references omitted]

[32] **An exception should be dealt with sensibly and not in an over-technical manner.[4] Thus, it is "only if the court can conclude that it is impossible to recognize the claim, irrespective of the facts as they might emerge at the trial, that the exception can and should be upheld."[5]**

[33] **If the exception is successful, the proper course for the court is to uphold it. When an exception is upheld, it is the pleading to which exception is taken which is destroyed. The remainder of the evidence does not crumble.[6] The upholding of an exception to a declaration or a combined summons does not, therefore, carry with it the dismissal of the summons or of the action.[7] The unsuccessful party may then apply for leave it is, in fact, the invariable practice of the courts, in cases where an exception has successfully been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time.[8]**

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[4] *Erasmus Superior Court Practice* above n 1 at D1-299 and the authorities cited at n 28 therein.
[5] Id and the authorities cited in n 29 therein.
[6] Id and the authorities cited in n 36.
[7] Id and the authorities cited in n 37 therein.
[8] Id and the authorities cited in n 39 therein.

[34] **Leave to amend is often granted irrespective of whether at the hearing of the argument on exception the plaintiff applied for such leave. If the court does not grant leave to amend when making an order setting aside the pleading, the plaintiff is entitled to make an application for such leave once judgment setting aside the pleading has been delivered.**[9] **If the unsuccessful party does not take any timeous steps, the excipient may take steps to bar him and apply to the court for absolution from the instance.**[10]

[35] **If a pleading is bad in law, the answer is to except;**[11] **if it is vague and embarrassing, notice to cure may be given or further particulars (for purposes of trial) may be requested; and if the legal representative for a party has been genuinely taken by surprise by his opponent's reference to the cause of action in the opening address, he should take the opportunity to say so at the outset and object to the evidence if it does not accord with the pleadings. What a party cannot do, is to sit back, say nothing and then complain that the pleading is defective and that he was taken by surprise.**[12]

[36] **The test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows -**[13]

a. **In each case the court is obliged first to consider whether the pleading does lack particularity to an extent amounting to**

[9] Id and the authorities cited in n 42 therein.
[10] Id and the authorities cited in n 43 therein.
[11] Id and the authorities cited in n 51 therein.
[12] Id and the authorities cited in n 52 therein.
[13] Id and the authorities cited in n 72 therein.

vagueness. If a statement is vague it is either meaningless or capable of more than one meaning.[14] To put it at its simplest: the reader must be unable to distil from the statement a clear, single meaning.[15]

b. **If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of.[16]**

c. **In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he objects.[17] A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.**

d. **The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.[18]**

e. **The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.[19]**

f. **The excipient must make out his case for embarrassment by reference to the pleadings alone.[20]**

g. **The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness.[21]**

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[14] Id and the authorities cited in n 73 therein.
[15] Id and the authorities cited in n 74 therein.
[16] Id and the authorities cited in n 75 therein.
[17] Id and the authorities cited in n 76 therein.
[18] Id and the authorities cited in n 78 therein.
[19] Id and the authorities cited in n 79 therein.
[20] Id and the authorities cited in n 80 therein.
[21] Id and the authorities cited in n 81 therein.

[37] **A summons will be vague and embarrassing where it is not clear whether the plaintiff sues in contract or in delict,[22] or upon which of two possible delictual bases he sues,[23] or what the contract is on which he relies,[24] or whether he sues on a written contract or a subsequent oral contract,[25] or if it can be read in any one of a number of different ways,[26] or if there is more than one claim and the relief claimed in respect of each is not separately set out.[27]**

[38] **Although the introduction of an irrelevant matter into a summons may make it vague and embarrassing, the pleading of an irrelevant matter as history does not.[28] The summons is also vague and embarrassing if there is inconsistency amounting to contradiction between the allegations in a claim in reconvention and the plea in convention,[29] or between the summons and the documents relied upon as the basis of the claim;[30] or where the admission of one of two sets of contradictory allegations in the plaintiff's particulars of claim or declaration would destroy the plaintiff's cause of action;[31] or where a pleading contains averments which are contradictory and which are not pleaded in the alternative.[32]**

Analysis of the particulars of claim and reasons

[39] **I now consider whether the first ground of exception is bad in law or vague and embarrassing to KPMG. I was referred to clause 7 the JAL**

[22] Id and the authorities cited in n 84 therein.
[23] Id and the authority cited in n 85 therein.
[24] Id and the authority cited in n 86 therein.
[25] Id and the authority cited in n 87 therein.
[26] Id and the authorities cited in n 88 therein.
[27] Id and the authorities cited in n 89 therein.
[28] Id and the authority cited in n 90 therein.
[29] Id and the authority cited in n 91 therein.
[30] Id and the authorities cited in n 92 therein..
[31] Id and the authorities cited in n 93 therein.
[32] Id and the authorities cited in n 94 therein.

which spells out the mechanism on cost savings and transactions value determination by Betapoint and the process to be embarked upon for invoicing purposes. I have checked the particulars of claim in relation to what has been pleaded in so far as this aspect is concerned, I find nowhere in the pleading is reference made about such processes having been followed. In the result, I am in agreement with KPMG on this point. It should be remembered that contracts are concluded freely by the parties concerned and unless they are fundamentally *contra bonos mores*, they should be enforced. In the instant case, there is no suggestion that clause 7 does not find application, but simply, as submitted on behalf of Betapoint, that although it has not been pleaded, it should be accepted that the negotiations prior to invoicing failed to yield positive results. I disagree with this submission, and consequently am of the view that unless the pleading is amended to deal with the necessary averment, KPMG will be embarrassed.

[40] **As regards the second ground of exception regarding an attempt to resolve the dispute as contemplated in section 10 of the Terms of Business, KPMG contends that the claim is bad in law because of the provision to agree. I do not agree with the contention. KPMG can plead to the particulars of claim in so far as it has been pleaded that an attempt was made during September 2019 to resolve the disputed Betapoint fees. There is no basis to seek at this exception stage to resile from the contract on the basis of the alleged invalidity of the contract based on section 10 of the Terms of Business. Accordingly, the second ground of exception must fail.**

[41] **The third ground of exception is raised against an alternative claim based on what Betapoint calls reasonable fees for the services rendered for**

KPMG. There is no bar in our law to plead the alternative in the event, for some reason, the main claim based on the JAL is not favourably considered by the Court. Accordingly, there is no basis at this stage to plead in the alternative, including the prayer for the development of common law to accord with the values of the Constitution. It follows therefore that the third ground of exception must also fail given that KPMG will not be embarrassed in pleading its defence to the alternative claim.

Order

[42] **In the result, the following order is made –**

1. **The exception on the first ground succeeds and Betapoint is directed to amend its pleadings within 15 days of this order;**
2. **The second and third grounds of exception are dismissed.**
3. **Each party is ordered to pay its own costs.**

SENYATSI M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 24 January 2024.

Appearances:

For the Excipient/Defendant:	Adv S Budlender SC Adv D Linde
Instructed by:	Bowman Gilfillan
For the Respondent/Plaintiff:	Adv G Marcus SC Adv D Watson
Instructed by:	Harris Nupen Molebatsi Inc.
Date of Hearing:	31 July 2023
Date of Judgment:	24 January 2024