

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2018/40674

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

9/5/2019

DATE

MOKOSE SNI

In the matter between:

GOVERNMENT EMPLOYEES MEDICAL SCHEME

Excipient

and

MAZIBUKO: MAVELA AUBREY

Respondent

In re:

MAZIBUKO: MAVELA AUBREY

Plaintiff

and

GOVERNMENT EMPLOYEES MEDICAL SCHEME

Defendant

JUDGMENT

- [1] This is an opposed exception in which the excipient raises complaints in which it alleges that the summons lack averments to sustain a cause of action and/or renders the particulars of claim vague and embarrassing.
- [2] The plaintiff's case is that on 18 March 2015 the plaintiff and the defendant concluded a written 'GEMS Network Agreement' ("the Agreement") in terms of which the plaintiff was appointed by the defendant as a 'participating family practitioner' in order to render 'covered services' to members of the defendant's scheme. The plaintiff accepted the appointment which was made on the basis of a willing provider concept.
- [3] The defendant excipiated to the plaintiff's particulars of claim on the basis that it lacks averments necessary to sustain a cause of action and/or that the particulars of claim are vague and embarrassing on the following grounds:
- (i) an unsigned version of the agreement was attached to the particulars of claim;
 - (ii) the plaintiff in his particulars of claim alleges defamation of the plaintiff by the defendant without setting out the words alleged to have actually been used by the defendant;
 - (iii) the plaintiff claims payment of R1 642 603,20 in the form of alleged damages calculated over a period of three years in the form of alleged loss of income without providing any factual or legal basis upon which the defendant could be held liable in respect of the agreement for the plaintiff's claim for loss of income;
 - (iv) the plaintiff claims R23 219,59 for services allegedly rendered without providing any factual or legal basis upon which the defendant could be liable in terms of the agreement.

- [4] It is trite law that for the purposes of adjudicating an exception, the facts as alleged in the challenged pleadings must be accepted as correct. It is essential that an excipient proves that the pleading is excipiable on every conceivable interpretation that can reasonably be attached to it and the pleadings must be looked at as a whole.¹
- [5] The excipient bears the onus of proving that the allegedly lacking in sufficient particularity is such as he would be embarrassed in pleading thereto. When the particularity pertains to a mere detail, the defendant's remedy is to utilise the Uniform Rules of Court and either plead to the averment made and to obtain the particularity he requires by means of the discovery in terms of the Rules of Court or by means of a request for particulars for trial of those particulars which are strictly necessary to enable the defendant to prepare for trial.²
- [6] Pleadings are deemed to be vague and embarrassing if when read as a whole, the pleadings are so unclear and ambiguous that the opposing party is uncertain of the case he is required to meet and, materially prejudiced if he is required to plead in answer thereto. To successfully establish an exception based on pleadings being vague and embarrassing, the excipient must satisfy the court of the following, that:
- (i) the allegation of vagueness and embarrassment must not relate to or be directed to particular and isolated paragraphs. They must relate to the whole cause of action;

¹ First National Bank of SA Ltd v Perry N.O. 2001 (3) SA 960 (SCA) at 965 C - D

² Jowell v Bramwell-Jones and Others 1998 (1) SA 836 at 902 B - D

- (ii) it requires the excipient to satisfy the court that the pleadings are so unclear and ambiguous that the reader thereof would be unable to determine a clear and single meaning from the statement; and
- (iii) the court must be satisfied that on any conceivable interpretation of the pleading, the excipient could not plead thereto without being embarrassed.

[7] In respect of an exception based on the failure of the plaintiff to sustain a valid cause of action, the allegations contained in the particulars of claim are deemed to be accurate. The excipient has to prove that even if all the allegations in the pleadings are genuine, they do not amount to the founding of a valid cause of action on any conceivable interpretation that could reasonably be attached to the pleadings.³

[8] At the commencement of the matter, counsel for the plaintiff indicated to the court that the point *in limine* had been abandoned.

The unsigned agreement

[9] The plaintiff avers in his particulars of claim that on 18 March 2015 at or near Germiston the plaintiff representing himself and the defendant duly represented by duly authorised representatives concluded a written GEMS Network Agreement and attached a copy thereof. Further averments in the particulars of claim make reference to the terms and conditions of the Agreement and that the plaintiff accepted such appointment.

³ Amalgamated Footwear and Leather Industries v Jordan & Co Ltd 1948 (2) SA 891 (C) at 893

[10] Counsel for the defendant is of the view that if the agreement was a written one as pleaded, a true copy of the part of it on which reliance is placed must be annexed and that the document annexed to the particulars of claim is not satisfactory and does not support the averments therein as it is incomplete. In particular, clause 5.1 of the agreement attached reads as follows:

"The appointment of the participating Family Practitioner shall commence once this agreement has been signed by both parties..."

[11] Counsel for the plaintiff argued that a notice of intention had since been delivered to substitute Annexure "A" with a signed version of the Agreement. Accordingly, the agreement is pleaded properly as there is available a letter by the plaintiff to the defendant dated 15 August 2018 wherein the signed written agreement is identical to the agreement attached to the particulars of claim.

[12] Rule 18(6) of the Uniform rules of Court provides as follows:

"A party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

[13] In the matter on hand, the agreement attached to the particulars of claim does not bear the signatures of both parties and contains one signature, being that of the defendant on the signature page. Furthermore, the agreement does not identify the 'Participating Family Practitioner' concerned and all other details required therein.

[14] I am of the considered view that it is not evident *ex facie* the agreement that the plaintiff is the 'Participating Family Practitioner' and that the defendant did appoint the plaintiff in such a position. The plaintiff's particulars of claim do not comply with the rules of court and are therefore vague and embarrassing. Accordingly, the attachment of the particulars of claim do not support the averments and the exception is upheld.

Defamation allegation

[15] The defendant asserts that a plaintiff suing for defamation must in his pleadings set out the words alleged to have been used. The plaintiff avers in the particulars of claim that 'the defendant contacted patients of the plaintiff and made statements to the customers of the plaintiff which entailed, alternatively carried the sting that...' without setting out the words alleged to have been used.

[16] As such, the plaintiff has failed to allege by who, on behalf of the defendant, the statements were allegedly made. Furthermore, the plaintiff has failed to allege that the persons to whom such statements were made understood the defamatory nature of the alleged statements.

[17] Counsel for the plaintiff, on the other hand, alleges that the defendant's assertion results in an erroneous legal conclusion and that the plaintiff had need only to plead publication. The court was referred to the decision in the matter of International Tobacco Co of SA Ltd v Wollheim⁴ where it was held that the old rule as to pleading should be relaxed to the extent of allowing the pleader to indicate in his declaration

⁴ 1953 (2) SA 603 (A) at 614A-B

that the words pleaded or more or less those words, or some similar qualification were used.

[18] The plaintiff has pleaded as follows:

"13. In addition, and on a number of occasions during the period of approximately the latter part of 2015 and the early part of 2016 the Defendant contacted patients of the plaintiff and made statements to customers of the plaintiff which entailed, alternatively carried the sting that the plaintiff was submitting irregular claims to the defendant for payment, alternatively that the plaintiff acted fraudulently in that the claims for services not actually rendered, further alternatively that the plaintiff inflates the claims which he submitted to the defendant."

[19] It is essential that particulars of claim are pleaded in such a manner that when read as a whole, they are not so unclear and ambiguous that the opposing party is uncertain of the case it is required to meet, and becomes materially prejudiced if it is required to plead in answer thereto.⁵

[20] The court in the matter of Crots v Pretorius⁶ said that apart from avoiding surprise the identity of persons involved is also relevant to enable the defendant to raise appropriate defences. The said can be said of the matter *in casu*. The claim as per the particulars of claim are vague and embarrassing as the defendant is unable to examine whether or not the alleged words are defamatory. As such, the exception is upheld.

⁵ Tuckers Land & Development Corporation v Loots 1981 (4) SA 260 (T) 263-264

⁶ 2010 (6) SA 512 (SCA) at para 15

Claim for loss of income

- [21] The plaintiff claims under claim 3 the sum of R1 642 603,20 as damages calculated over a period of three years in the form of alleged loss of income. In support of such claim, he relies on the defamation claim and the unlawful cancellation of the Agreement by the defendant without pleading any *facta probanda* or establishing any nexus between the conduct of the defendant and the damages suffered by the plaintiff. The defendant further alleges that the terms of the Agreement do not vest the practitioner with any right to render services in terms of the Agreement over a three year period. The Agreement could be cancelled at any time on 30 days' notice. As such, the plaintiff's claim which is calculated over a period of three years has no foundation.
- [22] The plaintiff was of the view that it had pleaded the nexus between the damages and the conduct of the defendant and that the court, in deciding the exception, must accept as correct.
- [23] As stated above, it is trite law that for the purposes of adjudicating an exception, the facts as alleged in the challenged pleadings must be accepted as correct. Furthermore, it is essential that an excipient proves that the pleading is excipiable on every conceivable interpretation that can reasonably be attached to it. As such, the pleadings must be looked at as a whole.⁷
- [24] I am of the view that the Defendant must plead what it believes is its defence in light of the principle that in deciding an exception the court must accept all the facts pleaded as correct. Accordingly, the exception is dismissed.

⁷ First National Bank of SA Ltd v Perry N.O. (supra)

Services Rendered

[25] The plaintiff claims, under claim 4, payment of the sum of R23 219,59 as an alleged outstanding value of the plaintiff's claims for services rendered to 'a number of clients'. The defendant is of the view that the paragraphs in support of such claim lack averments which are necessary to sustain a cause of action against the defendant. They are lacking in particularity and as such do not comply with Rule 18(4) and are vague and embarrassing.

[26] The plaintiff averred that he had attached a schedule to the particulars of claim in which he had indicated the patient's name and medical aid details showing that the clients are members of the defendant. As such, the defendant is not precluded from pleading its defence.

[27] I am of the view, in respect of this exception, that the Defendant must plead what it believes is its defence in light of the principle that in deciding an exception the court must accept all the facts pleaded as correct. Accordingly, the exception is dismissed.

[28] Accordingly, the following order is granted:

- (i) The exception on grounds 1 and 2 are upheld and paragraphs 4,5, 12, 13, 14, 15, 16, 17, 18 and 19 are hereby struck;
- (ii) The exceptions on ground 3 and 4 are dismissed;
- (iii) The plaintiff is ordered to amend the particulars of claim within fifteen (15) days of the granting of this order;
- (iv) The plaintiff is ordered to pay the defendants' costs of the exception.