

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)



Case number: 8861/2020

DELETE WHICHEVER IS NOT APPLICABLE

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

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In the matter between:

WIN SYSTEMS D.O.O. (FORMERLY NAMED GOLD

CLUB GAMING D.O.O)

PLAINTIFF

AND

DRGT AFRICA (PTY) LTD (FORMELY NAMED

DEFENDANT/

SIMPLICIT-E GAMING SOLUTIONS (PTY) LTD

EXCIPIENT

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] This is an exception to the plaintiff's particulars of claim in terms of Rule 23(1). It is alleged that the particulars of claim are both vague and embarrassing and does not disclose a cause of action. The grounds of exception were reduced after amendments were affected. This Court has to decide whether the exception should be upheld based on the remaining grounds.

THE BACKGROUND

[2] The plaintiff (respondent) is the manufacturer and supplier of gaming hardware and software ("the equipment"). Defendant ("the excipient") was appointed as the distributor in South Africa of the respondent's gaming equipment in terms of a Distribution Agreement. The Distribution Agreement makes provision for pricing to be determined at a later date and from time to time. The claim is for payment of the alleged daily fee and contractual damages. The amount claimed as the daily fee amounts to € 368 022-00. The contractual damages allegedly suffered will be quantified in due course.

[3] In a letter dated 7 August 2018 the excipient's attorney informed the respondent that all future payments would be withheld until the dispute was resolved. The letter indicates that daily fees were payable, but states that no payment will follow pending the resolution of another unrelated intellectual property dispute between the parties.

[4] The excipient initially delivered a notice of exception setting out twelve grounds of exception, following an amendment the excipient delivered a further notice of exception adding three additional grounds. The excipient in due course abandoned seven grounds of exception and persisted with grounds 1, 4, 6, 7, 9 and 13 combined, 10, 12 and 14.

THE LEGAL PRINCIPLES APPLICABLE TO EXCEPTIONS

[5] The aim of exception procedures is to avoid the leading of unnecessary evidence and to dispose of a case wholly or in part in an expeditious and cost-effective manner. Exception procedure is also aimed at ensuring that a proper identifiable case is set out and that the pleading is formulated in such a manner that the other party is put in a position to plead thereto without any confusion.

[6] In *Trope v South African Reserve Bank*¹ the following was said about an exception relying on the allegation that the pleading was vague and embarrassing:

“An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a

¹ 1992 (3) SA 208 (T) (“Trope”).

nature that the excipient is prejudiced (Quinlan v MacGregor 1960 (4) SA 383 (D) at 393 E – H). As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test – see the remarks of Conradie J in Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298G – H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other’s case and not to be taken by surprise may well be defeated. Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing – see Parow Lands (Pty) Ltd v Schneider 1952 (1) SA 150 (SWA) at 152F – G and the authorities there cited. It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading.”²

[7] To determine whether a pleading is vague and embarrassing the pleading must be read as a whole, as the exception is not directed at a particular paragraph.³ An exception based on vagueness and embarrassment is intended to rectify any defect or incompleteness in the manner in which the

² *Ibid* p 211 A – E.

³ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at p 899 G; *Nel and Others N.O. v McArthur* 2003(4) SA 142 (T) 149 F.

pleading is structured, which will result in embarrassment to the party required to plead and strikes at the formulation of the cause of action.⁴ It should furthermore only be allowed if the excipient will be seriously prejudiced, if the offending allegations are not expunged and can only be taken if the vagueness relates to the cause of action.⁵

[8] A court must consider whether the pleading lacks particularity to an extent amounting to vagueness. A statement is vague if it is either meaningless, or capable of more than one meaning.⁶ A two-fold consideration is required when determining whether a pleading is vague and embarrassing, the first is whether the pleading lacks particularity to the extent that it is vague. The second consideration is whether the vagueness leads to prejudice.⁷ The ultimate test when determining an exception is whether the excipient is prejudiced.⁸ The onus is on the excipient to proof both vagueness, embarrassment and prejudice.⁹

⁴ Trope and Others v South African Reserve Bank 1993 (3) SA 264 (A) at 268F, 269I.

⁵ Levitan v New Haven Holiday Enterprises CC 1991 (2) SA 297 (C) p 298 A.

⁶ Wilson v South African Railways & Harbours 1981 (3) SA 1016 (C) p 1018 H – 1019B.

⁷ Trope p 211 B.

⁸ Trope p 211 B; Francis v Sharpe 2004(3) 230 (C), p 240 E – F, Amalgamated Footwear & Leather Industries v Jordan & Co Ltd 1948(2) SA 891 (C) p 893.

⁹ Lockhat v Minister 1960(3) SA 765 (N) p 777 A; Colonial Industries Ltd v Provincial Insurance Co Ltd 1920 CPD 627, p 630.

[9] If the exception is based on an absence of a cause of action the court should deal with the exception sensibly and not in an over-technical manner.¹⁰

[10] Importantly, it must be remembered that for purposes of deciding an exception the court takes the facts alleged in a pleading as correct,¹¹ except if the facts are manifestly false and so divorced from the truth that they cannot be proven.¹²

[11] Before dealing with the separate complaints certain general observations need to be made. In this particular instance the excipient in various instances failed to read the particular of claim as a whole and followed on overly technical approach. When considering exceptions, the preferable approach should be to inquire whether unnecessary evidence and protracted litigation could be avoided by upholding the exception and whether a party is placed in the position to identify the cause of action, understand the claim against it and ultimately the case it should meet.

FIRST CAUSE OF COMPLAINT

¹⁰ Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standard Authority SA 2006 (1) SA 461 (SCA) p 465 H.

¹¹ Fase v Minister of Safety and Security 1991(3) SA 786 (CC) at par 73, par 81, Marney v Watson 1978(4) SA 140 (C) at 144.

¹² Natal Fresh Produce Growers Association & Others v Agroserve (Pty) Ltd & Others 1990(4) SA 749 (N) at 755B-C.

[12] The first cause of complaint is that there is no cause of action based on the Distribution Agreement or any written variation thereof.

[13] The excipient complains that the plaintiff's case appears to be based on a Distribution Agreement concluded on 29 February 2012 (the Distribution Agreement) between the defendant under its former name, Simplicite Gaming Solutions (Pty) Ltd, and Gold Club d.o.o., a Slovenian company.

[14] The complaint is that the three products which forms the subject matter of the present dispute, namely Duma, Sunstriker and Lion Share are not described in the Distribution Agreement and the definition of "*Products*" and therefore it is contended no amount can be payable in respect of these products

[15] The excipient argues that the non-variation clause contained in the Distribution Agreement, prohibits the introduction of the aforementioned three products and the Wide Area Progressive Gaming Machines ("WAP") without a proper written variation of the agreement. The respondent argues that when the Distribution Agreement was concluded on 29 February 2012 the three products were not in existence. These products were developed and supplied to the excipient after conclusion of the Distribution Agreement.

[16] The Distribution Agreement envisages, within its express terms, that there would be on-going development by the respondent of gambling games and products that would be made available to the excipient. This is provided for in clauses 7 and 8 of the Distribution Agreement. It therefore does not pass muster, at exception state at least, to argue that the introduction of these products amounts to a variation that would require a formal variation of the Distribution Agreement. This inference is supported by two emails which are attached to the particulars of claim, as POC 2.1 and POC 2.2, wherein amounts payable per day for the additional products are confirmed. At this stage the recordal of the price payable by the respondent's managing director proves a valid variation of the agreement.

[17] The complaint depends on the interpretation of the Distribution Agreement. This issue will be clarified by evidence during the trial. A court determining an exception is not in a position to interpret the contract where from a reading of the contract and e-mails, different interpretations are possible. Taking into account that the approach to be applied in the interpretation of the documents is that the words, context and the provisions and background of the document need to be considered.¹³ The pleading, read as a whole sets out a cause of action. It may well be that the respondent may not be able to prove that its interpretation is the correct one, but that will be for the trial court to determine as a result this ground of exception is dismissed.

¹³ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA).

THE FOURTH GROUND OF COMPLAINT

[18] This complaint is that the alleged variation of the Distribution Agreement is not properly pleaded and that Annexures POC 2.1 to POC 2.2 do not constitute amendments to the Distribution Agreement. Paragraph 8 of the particulars of claim reads as follows:

“8. Following upon the conclusion of the Distribution Agreement, and in or about March 2014, the defendant, represented by Charl Geysler, and Gold Club represented by Bostjan Stopar agreed that the defendant would pay Gold Club, in respect of every gaming machine that the defendant placed with its customer from time to time, in addition to the initial purchase price for each machine, the sum of € 3.50 per day, per machine (hereinafter referred to as “the daily fee”). Annexed hereto as:

8.1. “POC2.1” is correspondence dated 4 May 2015 from Mr. Geysler to Mr. Stopar confirming the daily fee payable in respect of the Duma and Sunstriker Gaming Machines; and

8.2. “POC2.2” is correspondence dated 27 August 2016 from Mr. Geysler to Mr. Stopar confirming the daily fee payable in respect of the Lion’s Share Gaming

Machine as well as again confirming the daily fee for the Duma and Sunstriker Gaming Machines.”

[19] It was argued by the excipient that the two attached emails do not refer to any agreement having been concluded during March 2014, or refer to the Distribution Agreement. For the reasons set out under the first ground of complaint, and having regard to the fact that the Distribution Agreement envisaged the development of new products, it is clear that evidence will have to be led to determine the veracity of the allegations. In *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another*¹⁴ it was found that the validity of a cancellation of an agreement that contained non-variation clauses could be proven by way of e-mails. The facts may be distinguishable, but the principle is the same. In any event, in POC 7 the defendant’s attorney confirmed the inclusion of the three aforementioned products. The pleading is not excipiable on this basis.

THE SIXTH COMPLAINT

[20] In paragraph 10 of the particulars of claim, the following is alleged:

“10. On or about 22 October 2016 and in furtherance of the Split-Off, Gold Club conveyed, transferred and assigned to the Plaintiff, among other assets, all of Gold Club’s Intellectual Property (as defined in the Share Purchase

¹⁴ 2015(2) SA 118 (SCA).

Agreement and hereinafter referred to as ‘the Intellectual Property’), which would include all rights and obligations under the Distribution Agreement as varied, including the right to charge for the daily fee, to the extent that it had not previously been transferred to the Plaintiff as part of the Split-Off. A copy of the Share Purchase Agreement and the Intellectual Property Assignment Agreement are annexed hereto as “POC4” and “POC5” respectively.”

[21] The excipient complains that the respondent failed to identify which provisions of POC 4 and POC 5 it relies on. It is argued by the excipient that POC 4 is irrelevant as it appears to be a share purchase agreement concluded by Gold Club d.o.o, Loris Pozar and an unrelated entity. POC 4 however, serves to prove that the session and assignment were concluded. This much is clear from a reading of the pleading in its entirety.

[22] The respondent explains that POC 5, which is the Intellectual Property Assignment Agreement, refers, within its terms to the share purchase agreement and, POC 4 was attached for that purpose only. The respondent argues, and correctly so, that if it is irrelevant, as the defendant asserts, it can plead so without embarrassment or prejudice. A reading of paragraph 10 makes it clear what the allegations are, and in this instance, it is not necessary to refer to specific parts of POC 4 and POC 5, when the paragraph is considered in context.

[23] The excipient continues to argue, that as far as Schedule 1 to Annexure POC 5 is concerned, no reference is made to trade mark registrations or applications for Duma, Sunstriker and Lion's Share. The respondent argues that the Schedule refers to Trademark Assignments and the present dispute between the parties is not a trademark dispute. As a result, there is no need to refer to Duma, Sunstriker and Lion's Share. It also follows that as part of the agreements referred to in paragraph 10, the addendums to the agreements attached for the sake of completeness, even if they are not strictly speaking relevant.

[24] Schedule 2 refers to Duma and Sun Stricker, (which is a misspelling of Sunstriker). Lion's Share does not appear in the Schedule as it forms part of the agreement entered into from 30 November 2016, which is after the Assignment Agreement. As set out above, the Distribution Agreement makes provision for the development of new products.

[25] Paragraph 10 of the particulars of claim must be read in context of the alleged cession and assignment and the rest of the particulars of claim and is neither vague nor embarrassing. The excipient seems to attempt to read the paragraph and the annexures in isolation, without applying the principal that the pleading should be read as a whole. There is no merit in this complaint and it is dismissed

THE SEVENTH COMPLAINT

[26] This complaint deals with an alleged invalid and contradictory addendum to the Distribution Agreement.

[27] Paragraphs 11 to 13 of the particulars of claim read as follows:

“11. The addendum records that all rights of Gold Club pursuant to the Distribution Agreement were transferred de iure following a split off with effect from August 2016 to the plaintiff.

“12. The addendum records that all rights of Gold Club pursuant to the Distribution Agreement were transferred de iure following a Split-Off with effect from August 2016 to the Plaintiff.”

13. A copy of the addendum is annexed hereto and marked “POC 6”.

[28] The addendum records that the Distribution Agreement was concluded on 29 February 2012 and that all rights of Gold Club d.o.o. were transferred to the respondent. The agreement to which the excipient is a party records its acceptance of the cession to the plaintiff. The defendant raises a number of exceptions based upon the assertion that no such cession took place.

[29] The excipient complains that annexure “POC6” which is dated 15 August 2017 (i.e. after the alleged variation of the Distribution Agreement was

concluded during or about March 2014) is not a valid addendum to the Distribution Agreement. However, it is required to read the pleading as a whole and keeping in mind that the disputed facts need not be determined at this point in time. This implies that the validity of the addendum cannot be determined at exception stage.

[30] There is no merit at all in the submission that because the respondent was not a party to the Distribution Agreement it could not have concluded a valid addendum. Apart from the other evidence of the cession and assignment, the addendum records the cession.

[31] The excipient argues furthermore that even if the addendum is valid, it contradicts the version of the respondent. To support this argument, it says that the specific purpose of Annexure POC 6 is to include Pyramid Jackpot. The excipient says that the other provisions dealing with the “obligation”, “Fee” and “Property Rights” relate specifically to Pyramid Jackpot and not to any of the additional products. The addendum does not contradict the provisions of the Distribution Agreement, as varied by the addition of Duma, Sunstriker and Lion’s Share, merely because it deals with “Pyramid Jackpot”, it also records that there are no other changes to the Distribution Agreement. This is particularly relevant to the present dispute.

[32] This is yet another instance where the excipient fails to read pleading as a whole and there is no merit in this complaint and the excipient can plead without embarrassment or prejudice to it.

THE NINTH AND THIRTEENTH COMPLAINTS

[33] In these complaints the excipient alleges that no cause of action arises from Annexure POC 7.

[34] The relevant part of paragraph 16 reads as follows:

“16. Despite acknowledging that the Defendant was obliged to pay € 3,50 per day per machine for every machine placed with its customers, on 7 August 2018, the Defendant notified the Plaintiff that it would cease to make payment of this amount. A copy of the notification is annexed hereto as “POC7”.

16.1 The acknowledgment of liability set out in the letter marked POC 7, is to be found in a letter dated 07 August 2018 from Shirlaine Farrell, the defendant’s duly authorized and instructed attorney, who was authorized and instructed to admit that her client’s obligation to pay the daily fee (albeit coupled with a unilateral decision to

suspend paying same pending the outcome of a related dispute)

“The monthly fees, initially paid by our Client to [plaintiff] and now also Best Gold Bet d.o.o. (which our Client is confused and concerned about, given that the aforementioned Company is not a party to the agreement and is not the developer or owner of the Gamestar Platform) comprise fees payable for the use in South Africa of the Gamestar Platform, future game development and ad hoc product support. Those payments have never been payments of license fees for the intellectual property subsisting in our Client’s Products, because such intellectual property has always belonged to our Client and as such, pending the resolution of this dispute, our Client is withholding any future payment of these fees until this matter is resolved.”

16.2 *The defendant’s attorney’s reference to ‘monthly fees’ is a reference to the daily fee of € 3.50 per day per machine computed over a month.*

16.3 *The defendant's attorney's reference to payments 'paid by our Client' were those payments that defendant had made to plaintiff or its agent, Best Gold Bet d.o.o.*

16.4 *The defendant's attorney's reference to 'the agreement' is a reference to the agreement between the parties in terms of which the defendant paid the daily fee of € 3.50 per day per machine.*

16.5 *The defendant's attorney's statement that 'our Client is withholding any future payment of these fees until this matter is resolved' is a communication of an intention not to withhold the daily fee of € 3.50 per day per machine until the dispute regarding the intellectual property referred to in that letter was resolved.*

16.6 *Accordingly the defendant thereby admitted owing the daily fee of € 3.50 per day per machine but unilaterally decided to suspend paying it until the said dispute was resolved.*

[35] The excipient argues that the Distribution Agreement does not regulate payment of fees payable for the use in South Africa of the Gamestar

platform, future game development and ad hoc product support and is therefore, not “*the agreement*” referred to in the paragraph of Annexure “POC7” quoted under paragraph 16.1 of the particulars.

[36] The excipient also argues that the respondent does not indicate on which part of Annexure POC 7 it relies as the contents of the annexure contradicts what is pleaded in paragraph 16 of the particulars of claim. It is however clear from the contents of POC7 that the excipient’s duly authorised attorney acknowledged her client’s obligations to the respondent under the Distribution Agreement and makes it clear that the monthly amounts payable was not in respect of licence fees. In its amendment, the respondent pleaded as follows in paragraph 16.7 of the particulars of claim:

16.7 In terms of:

*16.7.1 The agreement pleaded in paragraph 8 and 9 above:
and/or,*

*16.7.2 the agreement referred to by the defendant’s attorney in
her letter of 7 August 2018, POC 7,*

The defendant was obliged to continue paying the daily fee of €3.50 per day per machine to the plaintiff for so long as defendant used in South Africa the Gamestar Platform on the machines and such payment had to be made on a monthly basis.”

[37] The aforesaid makes it clear that the respondent relies on the agreement set out in POC 7 in the alternative, there is accordingly no merit in these complaints and they are dismissed.

THE TENTH CAUSE OF COMPLAINT

[38] The excipient contends that the respondent claims the daily fee of € 3.50 based on a variation of the Distribution Agreement, this it says is contradicted by POC 8 which refers to the Sun Master Agreement. In this complaint the excipient argues that the Sun Master Agreement is a different agreement from the Distribution Agreement and has no relevance to the present matter. Paragraph 18 of the particulars of claim where reference is made to POC 8 reads as follows:

“A schedule setting out the number of Duma, Sunstriker and Lion’s Share machines which the defendant had placed with customers and in respect of which it was obliged to pay the plaintiff € 3.50 per machine, per day as at 28 February 2018 is annexed hereto as “POC 8”.

[39] The respondent argues that the Sun Master Agreement is clearly a different agreement from the Distribution Agreement and has no relevance to the present matter. The respondent points out that POC8 is an email from the defendant’s managing director annexing a copy of the agreement, which from the context of the email and from the annexures, is clearly the agreement that

the defendant has in place with Sun International for the placement of the Duma Sunstriker and Lion's Share machines.

[40] Although paragraph 18 refers to a schedule only, POC 8 consists of various e-mails, the relevance of which is not explained. It is not clear from POC 8 that its purpose is to set out the number of Duma, Sunstriker and Lion Share in respect of which the excipient was obliged to pay the daily fee. In this regard the particulars of claim are vague and embarrassing and requires amendment.

THE TWELFTH CAUSE OF COMPLAINTS

[41] The excipients in this complaint argues that the Content of Annexures POC 10.1 to POC 10.27 and annexures to the letter of demand contained in POC 11 contradicts the respondent's version.

[42] The relevant part of the particulars of claim reads as follows:

"19. On 5 February 2019 the plaintiff gave the defendants 60 days' notice of termination of the Distribution Agreement. A copy of the notice is annexed hereto marked "POC 9".

19.1 That notice constituted a notice of cancellation of the agreement(s) referred to in 16.7 above, alternatively, the plaintiff communicated its election to cancel these

agreements by terminating the defendant's use of the Gamestar Platform in or about May 2019.

20. *Copies of the relevant and unpaid invoices payable by the defendant to the plaintiff are annexed hereto as "POC 10.1" and "POC 19.26" and a credit note dated 28 March 2019 is attached as "POC 10.27".*

21. *In the light of the defendant's failure to pay the daily Fee, the defendant is indebted to the plaintiff in the sum of the arrear daily fees due as at the date of cancellation, being € 368 022,00, and despite demand dated 5 February 2019, the defendant refuses and/or neglects to pay same to the plaintiff. A copy of the demand for payment is annexed hereto as "POC 11."*

[43] The excipient says that the invoices and credit note attached as Annexures "POC10.1" to "POC10.27" to the particulars of claim and the annexures to the letter of demand (Annexure "POC11") are issued by the respondent and do not relate to amounts due under the Distribution Agreement.

[44] The invoices and credit note refer to "Software License Fee" and

contradicts the version of the respondent that the amounts were payable in respect of the additional products in terms of the Distribution Agreement, as varied. The excipient says that no allegations relating to any software license agreement relating to the products have been pleaded. The excipient states the invoices and credit notes attached as Annexure POC 10.1 to POC 10.27 and the annexures to the letter of demand do not relate to the amounts due under the Distribution Agreement.

[45] Although the description on invoices of the services rendered cannot impact upon the rights and obligations of the parties under the Distribution Agreement, the pleading must at least explain why the invoices and credit notes do not refer to the daily fee, or why it refers to “*software licence fee*” in the light of the fact that the respondent’s claim that its claim is for the daily fee.

[46] This paragraph requires an amendment and the exception is upheld as far as this complaint is concerned.

THE FOURTEENTH COMPLAINT

[47] The fourteenth complaint is that there is no cause of action based on the “informal agreement” referred to in paragraph 16.11.2. of the particulars of claim.

[48] Paragraph 16.11 reads as follows:

“16.11 On 26 November 2018 the defendant filed in the United States Patent and Trademark Office before the Trademark Trial and Appeal Board a document referenced as Opposition No. 91242656 Serial no. 87/635049 Mark Sunstriker (“the Opposition Document”) in which it, under the hand of its attorney being duly authorised and instructed by the defendant so to do, pleaded as follows:

“ 16.11.1 [Defendant] struck and (sic) informal agreement with Gold Club relating to development work for its Wide Area Platform products and integration of its Wide Area Platform gaming software on the machines of Gold Club (Par. 11);

16.11.2 After the acquisition date by plaintiff of Gold club a Mr Ferdo Salamun, in communication with Charl Geysler, agreed that the plaintiff would charge a usage fee to defendant for running defendant’s Wide Area Platform gaming products on the Gamestar Platform of the plaintiff; the usage fee was suggested by defendant and accepted by plaintiff as a Euro 3.50 per slot, machine, the same usage fee charged by gold club to defendant previously; (par 18);

16.11.3 *Consistent with the agreement noted in paragraph 18 (of the Opposition document), defendant pays a Euro 3.50 day for each slot machine (“usage fee”) to plaintiff in South Africa solely for the use of the Gamestar Platform on which the defendant runs its Wide Area Platform gaming products; (par 19);*

16.11.4 *The fee is a usage fee charged to run defendant’s gaming software for its Wide Area Platform products on plaintiff’s Gamestar Platform machines.”*

[49] In paragraph 16.11 of the particulars of claim reference is made to papers filed in the United States Patent and Trademark Office before the Trademark Trial and Appeal Board. Reference is made to an “*informal*” agreement referred to in Opposition No. 912142656. The “*informal*” agreement referred to is not the Distribution Agreement and is not pleaded or relied upon.

[50] The respondent merely argues that the informal agreement is relied to in the alternative as pleaded in the particulars of claim. However, this is not clear from paragraph 6.11 or the rest of the particulars of claim and requires amendment to clarify the reliance on this informal agreement.

[51] The exception on ground fourteen is upheld.

CONCLUSION

[52] A perusal of the excipient's complaints reveal that the excipient in relation to several complaints did not read the particulars of claim as a whole. This resulted in an over technical approach, which lost sight of the ultimate purpose of pleadings. The excipient also attempted to address the parties' different versions on exception stage in instances where it was not appropriate to do so. The interpretation of the Distribution Agreement, the correspondence between the parties and the significance and purpose thereof will ultimately be determined at the trial. On the other hand, there are some issues, as set out above that requires amendment. In the light of the partial success of the excipient, each party should pay its own costs.

[53] The following order is made:

- 1. The exception is dismissed on grounds 4, 6, 7, 9, and 13.**
 - 2. The exception in relation to the 10th, 12th, and 14th complaint is upheld.**
 - 3. The respondent is given 15 days from date hereof to amend its particulars of claim.**
 - 4. Each party to pay its own costs.**
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R G TOLMAY

JUDGE OF THE HIGH COURT, PRETORIA

DATE OF HEARING: 8 FEBRUARY 2022

DATE OF JUDGEMENT:

ATTORNEYS FOR EXCIPIENT/

DEFENDANT: SHIRLAINE FARRELL ATTORNEYS

ADVOCATE FOR EXCIPINET/

DEFENDANT: ADV B H SWART (SC)

ADV L G KILMARTIN

ATTORNEYS FOR RESPONDENT/

PLAINTIFF: SPOOR & FISHER

ADVOCATE FOR RESPONDENT/

PLAINTIFF:

ADV L J MORISON (SC)