



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 7036/2023

In the matter between:

**BIG CONCERTS INTERNATIONAL (PTY) LTD
JUSTIN VAN WYK**

**First Respondent / Plaintiff
Second Respondent / Plaintiff**

and

THE TRUSTEES OF THE WINKLER FAMILY TRUST

Excipient / Defendant

Heard: 14 November 2023

Delivered: 29 November 2023 (Electronically)

JUDGMENT

Pillay AJ

THE PLAINTIFF'S¹ CLAIM

1. On 4 May 2023 Summons was issued in this matter.
2. On or about 3 July 2023 an Amended Particulars of Claim was filed.

¹ When this claim was initially instituted, it was instituted by two plaintiffs. The position was altered at a later stage. Accordingly, the judgment refers to two Plaintiffs where applicable.

3. The plaintiff claims the following relief:
 - 3.1. An Order declaring that the plaintiff's claim for any overcharging of electricity in respect of the premises situated at 6th Floor, Earlgo Building ("**the premises**") for the period 2007 until 2017 has not prescribed.
 - 3.2. An Order that the auditors of the Defendant ("**the Trust**") refer the calculation of the amount overpaid by the plaintiff to the Trust for the period 2007 until 2017 to its auditors in terms of the agreements of lease.
 - 3.3. Costs of suit.
4. The basis for the claim as pleaded may be summarised as follows:
 - 4.1. The plaintiff concluded various agreements of lease with the Trust, in terms of which it leased the premises, within the jurisdiction of this Court from the Trust for the period from 2007 until 2020.
 - 4.2. Express and material terms of the lease agreements include the following:
 - 4.2.1. The plaintiff "shall pay for all electricity and gas consumed by the Tenant on the Premises".
 - 4.2.2. "Should any dispute arise between the Landlord and the Tenant (in this regard) then the decision of the auditors of

the Landlord for the time being (acting as experts and not as arbitrators) as to such dispute shall be final and binding on the parties.”

- 4.3. During the period from 2007 until 2020, the agent of the Trust furnished the plaintiff with monthly invoices, which invoices included, *inter alia*, a monthly charge for electricity allegedly consumed by it in or on the premises.
- 4.4. The plaintiff duly paid all the monthly invoices furnished to it by the Trust’s agent, in the *bona fide* and reasonable belief that it was only charged for electricity consumed by it in or on the premises.
- 4.5. During August 2020, the plaintiff became aware that it was in fact also charged for the electricity consumed by Vodacom for its telecommunication towers and the electricity consumed for the lighting for the emergency stairwell of the building.
- 4.6. The plaintiff accordingly paid the Trust for the electricity consumed by Vodacom for the latter’s telecommunication towers and the electricity consumed for the lighting for the emergency stairwell of the building for the period from 2007 until 2020 in the *bona fide* and reasonable belief that it was only charged for electricity consumed by it in or on the premises.
- 4.7. The amounts overpaid by the plaintiff to the Trust were not owing, but the Trust nevertheless appropriated the monies.

- 4.8. The Trust had repaid the amount of R 287 500.00 to the plaintiff for the amount overpaid for the period from 1 January 2018 until 31 December 2020, but has refused to repay the amount overpaid for the period 2007 until 31 December 2017.
5. On the issue of prescription, the following is pleaded in the Particulars of Claim:
- “13. The Trust alleges that the plaintiff’s claim for repayment in respect of the period from 2007 until 2017 has prescribed in terms of the Prescription Act because the plaintiff allegedly knew of the overbilling, alternatively, reasonably ought to have known thereof, as same could have been ascertained by a reasonably diligent person.
14. The plaintiff deny (sic) the Trust’s allegation that its claim for overcharging has prescribed on the grounds specified in paragraph 13 hereof or on any other grounds. The plaintiff only became aware of the overbilling during August 2020 and the overbilling would not have been ascertained by a reasonable person prior to August 2020.”

THE EXCEPTION

6. On 14 June 2023, the defendant filed an Exception to the Particulars of Claim.
7. On 24 October 2023, the defendant filed an Amended Exception to the Particulars of Claim.
8. The grounds of exception may be broadly summarised as follows:
- 8.1. No cause of action is disclosed by the second plaintiff in that he was not a party to the lease agreements concluded between the first plaintiff and the defendant (“**the complaint in respect of the second plaintiff**”).

- 8.2. The Particulars of Claim do not disclose a cause of action in respect of the Declaratory Order sought in prayer (a) as they have failed to set out the basis on which they seek an Order declaring that the claim has not prescribed.
- 8.3. The plaintiffs have failed to disclose a cause of action in respect of the claim contained in prayer (b) in that they have failed to make the proper averments required to establish their claim. It is alleged in this regard that the plaintiffs ought, at a minimum, to have alleged that:
- 8.3.1. There is a legal obligation on the defendant to provide the plaintiffs with an account.
- 8.3.2. The defendant failed to provide said account.
- 8.3.3. The plaintiffs are unable to calculate the amount to be claimed in the absence of said account being delivered.
- 8.4. The plaintiffs have failed to disclose a cause of action against the defendant in respect of the relief sought in prayer (b) as an order is in fact sought against the defendant's auditors, who have not been joined in these proceedings.
- 8.5. The plaintiffs have failed to disclose a cause of action against the defendant in respect of a clearly prescribed claim. The plaintiffs aver that the defendant contends that their claim has prescribed, yet fails to

disclose a basis on which the defendant's averment ought to be rejected.

- 8.6. Insofar as the plaintiff's claim seems to be for the repayment of monies allegedly overpaid to the defendant, such claim is founded on an unjustified enrichment claim. The Particulars of Claim disclose no cause of action in respect of an enrichment claim against the defendant (**"the enrichment claim"**).
- 8.7. The Particulars of Claim indicate that the plaintiff gained knowledge of the overbilling in August 2020. Despite this knowledge, the plaintiff's claim does not include a claim for the payment of the debt, as contemplated by section 15 (1) of the Prescription Act No 68 of 1969 (**"the Prescription Act"**). A period of more than three years has passed since the plaintiffs gained knowledge of their alleged claim, which means the claim has since prescribed as contemplated by sections 10 (1), 11 (d), 12 (1), 12 (3) and 15 (1) of the Prescription Act. The relief sought in prayer (a) is thus contradicted by the Particulars of Claim itself.
- 8.8. In addition, the relief sought in prayer (a) is open ended and perpetual in nature. If granted, it will have the effect of disregarding the relevant provisions of the Prescription Act which specifically provide that a debt prescribes after three years. Such relief is bad in law and in contravention of the Prescription Act (**"the ambit of the relief"**).

9. It is common cause that certain grounds of exception have been overtaken by events and more particularly, the amendment of the Particulars of Claim. As a result: (a) the grounds of exception relied on in respect of the second plaintiff is no longer an issue for determination; (b) the grounds of exception relied on in respect of the non-joinder of the auditors is no longer an issue for determination.

10. In addition, I am of the view that neither the ground relating to the enrichment claim nor the ambit of the relief, found a ground of exception as pleaded. This is so for the following reasons:
 - 10.1. This claim is for a declaratory order and certain ancillary relief. This is competent relief as recognised by the SCA in **Investec Bank Ltd v Erf 436 Elandspoort (Pty) Ltd and Others** 2021 (1) SA 28 (SCA). Neither the declaratory Order in the terms sought nor the consequent relief constitutes a claim founded on enrichment. It was therefore not necessary for the Particulars of Claim to disclose a cause of action founded on enrichment.

 - 10.2. As to the ambit of the relief, I am not satisfied that that the ground that the relief is bad in law and in contravention of the Prescription Act founds a ground of exception. If the claim is found to have merit, the Court ultimately determining this matter will grant an Order that is just and equitable.

11. As a result, the only ground of exception relates to prayer (a) in respect of the claim of prescription.

THE EXCEPTION IN RESPECT OF PRESCRIPTION

The complaint

12. Three separate grounds of exception have been raised in relation to prayer (a) (leaving aside the ambit of the relief), viz: (a) a cause of action has not been disclosed because the Particulars of Claim have failed to set out the basis for an order declaring that its claim has not prescribed; (b) the Particulars of Claim have failed to disclose a cause of action against the defendant in respect of the claim which has clearly prescribed; (c) the Particulars of Claim disclose that the plaintiff gained knowledge of the overbilling in August 2020 thereby showing that a period of more than three years has passed since the plaintiff gained knowledge of the alleged claim.
13. I shall not deal with each of these grounds individually but shall do so with reference to the issues identified below.

The relevant legal principles

The rules in respect of pleadings

14. Rule 18(4) reads:

“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or

answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

15. The function of pleadings, as stated by *Halsbury*², is:

“to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties... It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings the appropriate method of trial can be determined. They also form a record which will be available if the issues are sought to be litigated again. The matters in issue are determined by the state of pleadings at the close if they are not subsequently amended.”

16. In **Buchner and Another v Johannesburg Consolidated Investment Co Ltd** 1995 (1) SA 215 (T) at 216I-J the Court held:

“The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based.”

17. In **Buchner**:

17.1. The respondent claimed:

“payment of the sum of R1 353 216,89, being the sum which its subsidiary companies, Lonehill Estates (Pty) Ltd and Glenny Buchner Investments (Pty) Ltd, are obliged to pay to the First National Bank of Southern Africa Ltd in terms of certain suretyship and which sum, together with interest thereon at the

² Halsbury's Laws of England 4th ed (Reissue) vol 36(1) para 5. Quoted in Cilliers et al Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa* Vol 1 at p 558.

rate of 20,25% per annum from 30 April 1992 to the date of payment, the defendants are liable to reimburse to the plaintiff pursuant to the provisions of an agreement between the plaintiff and the defendants dated 26 June 1987 and which the defendants have failed, notwithstanding due and lawful command, to pay to the plaintiff.”

- 17.2. The phrase in which the grounds for the claim against the appellants are set out in that paragraph, reads:

“The defendants are liable to reimburse the plaintiff pursuant to the provisions of an agreement between the plaintiff and the defendants dated 26 June 1987.”

- 17.3. The Court held:

“This [the above quoted paragraph] is an expression of the respondent's opinion, of its conclusions, as to the facts of the matter and as to the legal consequences of those facts. The relevant facts which must be set out are not only that a contract was concluded, but also that certain terms were agreed upon in that contract.

The conclusion that the appellants are liable can only be reached or justified if those terms support the conclusion set out in the summons. Those material facts were not set out in the respondent's summons and it follows that the summons does not contain a cause of action. I realise that the exposition of the facts contained in a summons is no more than the pleader's opinion, or of his averment as to what the facts are. If such a statement is not disputed those alleged facts have to be accepted as proven. An opinion or conclusion as to what the parties' liabilities are, even if undisputed, does not become a statement of fact and a failure to dispute the conclusion is of no consequence.”

18. Every pleading must contain a clear and concise statement of the material facts, preferably in chronological order, upon which the pleader relies for his claim and must contain sufficient particularity to enable the opposite party to

reply to it. The necessity to plead material facts is in accordance with the general requirement of the common law.³

The legal principles in respect of exceptions

19. Not every pleading that does not comply with the rules of pleadings is excipiable. Uniform Rule 23 provides for the delivery of an exception where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be.
20. In **Tem bani and Others v President of The Republic of South Africa and Another** 2023 (1) SA 432 (SCA) the Court held:

“[14] Whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law, in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out, it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.”

The law in relation to prescription

21. As regards the issue of prescription, the following is trite:

³ Cilliers et al Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa* Vol 1 at p 565.

- 21.1. Section 12(1) of the Prescription Act provides that, as a general rule, “prescription shall commence to run as soon as the debt is due”.
- 21.2. Section 12(3) of the Prescription Act states that the debt “shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises”, but includes a proviso that “a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care”.
- 21.3. Prescription may be interrupted in various ways, which are not relevant for present purposes.
- 21.4. The onus of establishing that a claim has prescribed rests on the party raising prescription. In order to discharge that onus, the onus-bearing party is required to prove the date when prescription began to run and that the other party had the requisite knowledge of the material facts from which the debt arose at that time.⁴
- 21.5. The nature of the knowledge that a party is required to have in order for prescription to start running was set out as follows in **Truter and Another v Deysel**⁵:

“For the purposes of the Act, the term “debt due” means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with

⁴ **Zurich Insurance Co South Africa Ltd v Gauteng Provincial Government** 2023 (1) SA 447 (SCA) at par 20, citing **Gericke v Sack** 1978 (1) SA 821 (A) at 827H – 828C; **Links v Department of Health, Northern Province** 2016 (4) SA 414 (CC) (2016 (5) BCLR 656; [2016] ZACC 10) paras 24 and 44.

⁵ **Truter and Another v Deysel** 2006 (4) SA 168 (SCA) ([2006] ZASCA 16) para 16.

his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.”

21.6. In terms of section 12(3) of the Prescription Act a debt is deemed to be due when a creditor has knowledge of the identity of the debtor and of the facts from which the debt arose. The creditor is deemed to possess the requisite knowledge if he or she could have acquired it by exercising reasonable care.⁶

Discussion

22. Given that the Plaintiff seeks an Order that its claim has not prescribed, it must establish the basis for the claim.

23. In my view, the Particulars of Claim disclose a cause of action in support of prayer (a) in that:

23.1. The relief sought relates to a declarator that the claim has not prescribed. This is distinct from a claim that a debt is due and in respect of which the Prescription Act finds application.

23.2. In any event:

23.2.1. The basis for this Order (as pleaded in the Particulars of Claim) is that “the plaintiff only became aware of the overbilling during August 2020 and the overbilling would not have been ascertained by a reasonable person prior to August 2020.”

⁶ **Shoprite Checkers (Pty) Ltd v Mafate** 2023 (4) SA 537 (SCA) at par 25.

23.2.2. The Summons was issued within three years from August 2020.

23.2.3. It follows that to the extent that the Court ultimately determining this matter is to find that the Prescription Act finds application, *ex facie* the Particulars of Claim, the claim for the declaratory relief was instituted within a period of three years from the date on which the plaintiff alleges that it became aware of the overbilling.

24. The questions of whether: (a) the Prescription Act finds application; and/or (b) the claim has in fact prescribed; and/or (c) who bears the onus in the matter, are not issues for determination by this Court at this stage of the process.

COSTS

25. It is clear that the grounds of exception in relation to prayer (b) have been overtaken by the amendment of the Particulars of Claim on 24 October 2023. In the circumstances, the Defendant ought to be entitled to his costs relating to prayer (b) until 24 October 2023.

26. As regards the remaining ground of exception, I see no reason as to why costs should not follow the cause.

ORDER

27. In the circumstances, I make the following Order:

“(1) The grounds of exception in relation to prayer (a) are dismissed.

- (2) The defendant/ excipient is ordered to pay the costs of the exception relating to prayer (a)
- (3) The plaintiff (Big Concerts International (Pty) Ltd) is ordered to pay the costs of the exception relating to prayer (b) up to 24 October 2023.”

Pillay AJ
Acting Judge of the High Court

Appearances

For the Excipient / Defendant

Advocate J P Steenkamp

Instructed by

Ben Groot Attorneys Inc.
(ref: B Groot)

For the Respondents / Plaintiffs

Advocate S F Mouton

Instructed by

Boshoff Njokweni Attorneys
(ref: L Boshoff)

