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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – GQEBERHA**

REPORTABLE/NOT REPORTABLE

Case No: 2568/2021

In the matter between:

LANGKLOOF STEENWERWE (PTY) LTD

t/a LANGKLOOF BRICKS

Excipient/Defendant

and

ROWE DESIGN AND CONSULTING (PTY) LTD

Respondent/Plaintiff

JUDGMENT

MAKAULA J:

A. Introduction:

[1] This is an exception brought by the excipient (the defendant) against the amended particulars of claim: - (the particulars) issued by the respondent (plaintiff). The defendant's contention is that the particulars are vague and embarrassing alternatively lack the necessary averments to sustain the plaintiff's claim - the plaintiff having been afforded an opportunity to remove the causes of complaint and having refused or neglected to do so. The application is opposed by the plaintiff.

B. Background:

[2] During the period 1 July 2013 to 25 July 2014, the plaintiff employed the defendant to construct 18 Vertical Shaft Bricks Kilns (RVSBK)¹. Subsequent to the completion of the construction of the RVSBK, the parties entered into a written agreement on 10 February 2017 governing their relationship going forward pertaining to the RVSBK and other factors concerning their relationship.

C. The plaintiff's case:

[3] The plaintiff avers in its particulars that during December 2020, the defendant approached it and requested a design evaluation and a quote for the upgrade of six prior existing VSBK kilns (not defined or encompassed in the agreement) at its premises in terms of clause 4 of the agreement. The plaintiff obliged and furnished the defendant with quotations. The defendant rejected the quotations. The plaintiff further avers that the defendant, despite its rejection, went ahead and commenced to refurbish and modify the six VSBK kilns making use of the plaintiff's intellectual property contrary to and in breach of the agreement.

[4] The plaintiff sues for an interdict prohibiting the defendant from using its confidential intellectual property set out in the agreement and seeks damages in the amount of R623 587.50.

[5] The crux of the plaintiff's claim is that the defendant, acting in terms of clause 4 of the agreement, requested a design evaluation and quotation from the plaintiff for the upgrade of the six VSBK kilns not defined or encompassed in the agreement. Upon rejection of the quotations furnished by it, the defendant on 19 April 2021 commenced to refurbish and modify the six VSBK kilns at its place using the plaintiff's confidential intellectual property in contravention of various clauses of the agreement. The plaintiff pleads that in clause 6 of the agreement, the defendant acknowledged the confidentiality of the information and that the plaintiff gave the defendant the right to use the confidential information only as set out in the agreement. In amplification, the plaintiff avers that the right to use the confidential

¹ "RVSBK's" means the Recirculating Vertical Shaft Brick Kilns design developed by Rowe, including all methodologies, formulae, trade secrets, drawings, technical data and specifications, implementation methods and the like relating thereto developed, designed and implemented by Rowe.

information is only in respect of the RVSBK and no other purpose as it was done by the defendant.

[6] The plaintiff submits that by using its confidential information, the defendant breached the agreement and the plaintiff suffered damages as a consequence thereof. In computing the damages, the plaintiff contends that it complied with Rule 18 and had differentiated between the market value of its confidential intellectual property costs at 30% of the estimated project costs.

D. Defendant's case:

[7] The defendant argues that the particulars are excipiable because clause 4.1 expressly provides that the defendant is not entitled to alter or modify or upgrade the RVSBKS "save for the use". The defendant relies on the provisions of clause 4.7 of the agreement.

[8] The defendant further argues that the failure by the plaintiff to annex to the particulars copies of the invoices which were rejected by the defendant and its failure to allege or contend that its price was reasonable or appropriate could not constitute a breach of the agreement. The defendant contends that it is entitled to reject the quotation and could not attract liability as a consequence of such rejection, especially where the defendant's intention was to modify and upgrade the VSBK kilns which were not part of the agreement. The alleged breach of the agreement is excipiable because it is not supported by material facts and does not find support from the agreement.

[9] Regarding the amount claimed, the defendant submits that the 30% of the estimated costs is unclear whether it is intended to be a reference to the profit that the plaintiff would have made or the mark-up which the plaintiff was entitled to raise over and above the cost of the project. Therefore, the computation of the damages is entirely unclear and not pleaded thus leading to the conclusion that Rule 18 of the Uniform Rules has not been complied with. In sum, the defendant, concludes that the plaintiff's cause of action has not been adequately or appropriately pleaded and the defendant is prejudiced thereby as it is unable to identify the cause of the action or the basis upon which the plaintiff claims the amount set out in the particulars.

E. The Particulars of Claims:

[10] The relevant particulars and the terms of the agreement pleaded by the plaintiff and which are excepted to: -, are the following:

“7.3 The Plaintiff granted to the Defendant a personal, perpetual, non-exclusive and non-transferable licence to use the RVSBK’s at its factory situate adjacent to the P[...] B[...] Road, Humansdorp, the sole and exclusive purpose of upgrading and ensuring that the best practice is utilised in the design and construction of the RVSBK’s at the Defendant’s aforesaid factory to ensure that it fires best quality bricks from time to time and at no other premises and for no other purpose unless the Plaintiff agrees otherwise in writing.

7.4 Except for the licence granted by the Plaintiff to the Defendant in terms of the agreement, the Plaintiff grants no other licences with respect to the RVSBK’s to the Defendant and there shall be excluded from the agreement any further licences, whether express or implied, statutory other than as agreed to in or otherwise with regard to the RVSBK’s other than as agreed to in writing by the Plaintiff.

7.6 The parties acknowledged that the confidential information is of great importance to the Plaintiff; is a valuable special and unique asset; and that the Plaintiff may suffer irreparable harm or substantial economic and other loss in the event of such confidential information being disclosed or used otherwise than in accordance with the agreement.

7.7 The Defendant acknowledged that all confidential information disclosed or which becomes known to it pursuant to the provisions of the agreement is proprietary to the Plaintiff and does not confer any rights whatsoever in such confidential information to give the Defendant the right to use same save as set out in the agreement.

7.9 The Defendant agreed that monetary damages will not be a sufficient remedy for breach of the undertakings given in the agreement and, without prejudice to any other rights and remedies available to the Plaintiff, agreed that the Plaintiff shall be entitled to relief by way of an interdict, specific performance or otherwise.

8. During December 2020 and at Langkloof Bricks Factory, P[...] B[...] Road, Humansdorp the said Blake acting on behalf of the Defendant, met with the said Rowe, acting on behalf of Plaintiff, requesting a design evaluation and a quote from Plaintiff for the **upgrade of six prior existing VSBK kilns (not defined or encompassed in the agreement marked A)** at its said premises in terms of clause 4 of the said agreement.

9. The Plaintiff furnished the Defendant with a design evaluation and quotes on 4 December 2020; 3 March 2021; 24 March 2021 and 16 April 2021.

10. The Defendant rejected the said quotations in writing on 16 April 2021. The letter is attached as annexure "B".

11. On Monday 19 April 2021 the Defendant commenced **to refurbish and modify the original VSBK kilns at its said premises making use of Plaintiff's confidential intellectual property referred to in "A"**.

12. In doing so, the Defendant breached the said agreement of the parties.

13. In the premises the Plaintiff has a clear right to the protection of its confidential intellectual property, the Defendant is using such confidential intellectual property in the refurbishing and modifying of six kilns at its premises and the Plaintiff has no protection by any other ordinary remedy.

14. Alternatively, the Defendant has caused the Plaintiff to suffer damages by breaching the agreement by using its confidential intellectual property for

purposes for which it was not allowed in the agreement, such damages made up as follows”.

The estimated total cost of the project

14.1	RVSBK building works	R1 050 000.00
14.2	RVSBK steel components	R 270 000.00
14.3	Fan Ind Exh System	R 240 000.00
14.4	Instrumentation and controls	R 180 000.00
14.5	Drawing / design costs	R 175 000.00
14.6	Project Management and training	<u>R 163 625.00</u>
		<u>R 2 078 625.00</u>

14.7 The market value of the Plaintiff’s confidential intellectual property amounting to 30% of the estimated project costs, that is to say R 623 587.50.

F. The exception:

[11] The exception, as stated, is premised on the interpretation of the provisions of the agreement. It is prudent therefore to refer to the exception as it is to avoid any confusion that might occur in the process of paraphrasing it. The exception reads:

“1. The Plaintiff relies upon a written agreement annexed as Annexure “A” to the Particulars of Claim. Clause 4.1 of that agreement records that the granting of the “licence” in respect of the so-called VSBK’s at the Defendant’s factory is for the “sole and exclusive purpose of upgrading and ensuring that the best practice is utilised”.

2. The prohibition against modification contained in Clause 4.3 of the agreement is however, expressly, subject to the “use thereof as set out in clause 4.1 above.” i.e., “modification” includes “upgrading”.

3. Clause 4.7 of the agreement provides that any “assistance” to the Defendant shall be at “a consultancy fee as agreed to between the parties.”

4. Clause 13.1, which provides for “breach” concerns “unauthorised disclosure or publication or use of the confidential information”.

5. Paragraph 8 of the Particulars of Claim refers to a “request” for a “design evaluation and quotations from the Plaintiff for the upgrade of six prior existing VSBK kilns at its said premises in terms of Clause 4 of the said agreement.”

6. Paragraph 9 of the Particulars of Claim refers to the furnishing of a “design evaluation and quotes” on four separate occasions. Notwithstanding such “quotes” being in writing no such documents are annexed to the Particulars of Claim.

7. Sub-paragraph 10 of the Particulars of Claims refers to the “rejection” of the said quotation or quotations. The document annexed as Annexure “B” rejects the “quote”, *ex facie* the email, on the basis of an excessive price. The Plaintiff does not allege or contend that its price was reasonable or appropriate, and the rejection of an excessive price cannot constitute a breach of Annexure “A”.

8. *Prima facie* therefore, the Defendant was entitled to reject the “quote” and the Defendant could not attract liability as a consequence of such rejection.

9. The alleged breach in paragraph 12 of the Particulars of Claim is accordingly not supported by any material facts.

10. In paragraph 13 of the Particulars of Claim it is alleged that the Defendant is utilising “confidential intellectual property in the refurbishment and modifying of six kilns at its premises”. The refurbishing and modification of existing kilns cannot, on a proper construction of Annexure “A” constitute a breach of that agreement.

11. Paragraph 14.7 of the amended Particulars of Claim refers to the “*market value of the Plaintiff’s confidential intellectual property amounting of 30% of the estimated project cost.*” It is unclear whether this is intended to be a reference to the profit which the Plaintiff would have made, or the mark-up which the Plaintiff was entitled to raise over and above the cost of the project”.

[12] The defendant places reliance for such contention on the provisions of the agreement particularly clauses 4 and 3.1. It is essential for me to deal with the provisions of clause 4 as they appear in the agreement for the simple reason that both parties rely on such provisions for the contention that the summons is either excepiable or not. Clause 4 reads:

“Grant of Use Licence”

“4.1 Rowe hereby grants to Langkloof Bricks a personal, perpetual, non-exclusive and non-transferrable licence to use the RVSBK’s at its factory situated adjacent to the P[...] B[...] Road, Humansdorp for the sole and exclusive purpose of upgrading and ensuring that the best practice is utilised in respect of the design and construction of the RVSBK’s at Langkloof Bricks’ aforesaid factory to ensure that it fires best quality bricks from time to time and at no other premises and for no other purpose unless Rowe agrees otherwise in writing.

4.2 Except for the licence granted by Rowe to Langkloof Bricks in terms of this Agreement, Rowe grants no other licences with respect to the RVSBK’s to Langkloof Bricks and there shall be excluded from this agreement any further licences, whether express or implied statutory or otherwise with regard to the RVSBK’s other than as agreed to in writing by Rowe.

4.3 Langkloof Bricks shall not alter or in any way modify the RVSBK’s or any documentation relating thereto in any manner whatsoever, save for the use thereof as set out in clause 4.1.

4.7 Should Langkloof Bricks require any assistance from Rowe in respect of the implementation or in respect of any other aspects relating to any modification, enhancement, addition, variation and/or amendment in respect of the RVSBK's made available by Rowe to Langkloof Bricks in terms of this agreement. Rowe shall be under no obligation to provide such assistance to Langkloof Bricks in terms of this agreement and in the event of it rendering any such assistance to Langkloof Bricks it shall be at a consultancy fee as agreed to between the parties". (Emphasis added).

G. Analysis:

[13] Grounds of exception are rooted in Rule 23(1) of the Uniform Rules of Court². An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity³. In *Trope v South African Reserve Bank*⁴ McCreath J considered the scope of and meaning of the basis for an exception on the ground that a pleading is vague and embarrassing as follows:

"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 nature that the excipient is prejudiced (*Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393E-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 be taken by surprise may well be defeated.

² Rule 23 (1) Provides: "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 set it down for hearing in terms of paragraph (f) of subrule (5) rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception".

³ *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269 I.

⁴ 1992 (3) SA 208 (TPD) at 211 B-D.

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 allegation 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 pleadings”.

[14] This dictum has been approved in a number of decisions. As a corollary to the above, in *Jowell v Bramwell-Jones and Others*⁵ Heher J said:

“It is therefore incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it”.

[15] In the present matter, the plaintiff pleads that pursuant to the installation of its construction of the 18 RVSBK kilns they entered into an agreement that defined their relationship going forward about the protection of its confidential and intellectual property rights and written use licence, the terms and condition of which are set out in the agreement. The plaintiff further pleads that after it had issued quotations for the upgrade of the six VSBK kilns, not defined or encompassed in the agreement, the defendant, in contravention of the agreement, used the plaintiff’s design evaluations to refurbish and modify the VSBK kilns making use of its confidential intellectual property protected by the agreement⁶. To me, there is nothing that is vague and embarrassing in the particulars. All the plaintiff avers is that the agreement covers the protection of his confidential and intellectual property and not

⁵ 1998 (4) SA 836 at 902H.

⁶ Paragraph 11 of the amended particulars of claim.

necessarily the 18 RVSBK kilns. These facts are sufficient for the defendant to plead. It shall remain for the plaintiff to establish the facts pleaded during trial and for the court to decide.

[16] The words of Corbett JA in *Dettmann vs Goldfain and Another*⁷ ring true in this matter when he said:

“It is true that, generally speaking, the Court is reluctant to decide upon exception questions concerning the interpretation of a contract where the whole contract is not before the Court or where it appears from the contract itself or from the pleadings that there may be admissible evidence which, if placed before the Court, could influence the Court’s decision as to the meaning of the contract (See *Delmas Milling Co. Ltd. v Du Plessis*, 1955 (3) S.A. 447 (A.D.) at p. 455; *Davenport Corner Tea Room (Pty.) Ltd. v Joubert*, 1962 (2) S.A. 709 (D)). In the latter case Miller J., emphasised (at p. 716) that before the possibility of evidence of surrounding circumstances influencing the Court’s decision should be allowed to debar the Court from deciding the issue on exception that possibility should be something more than notional or remote one”. (Footnotes omitted)

[17] Clause 4.1 grants a use licence to the defendant, for its “sole and exclusive purpose of upgrading and ensuring that the best practice is utilised in respect of the design and construction of the RVSBK’s at Langkloof Bricks aforesaid factory . . . and at no other premises and for no other purpose unless Rowe agrees otherwise in writing”. Clause 4.2 prescribes that the use of the licence shall be in respect of the RVSBK only and states “there shall be excluded from this agreement any further licenses, whether express or implied.

[18] The reading of clause 4, as a whole and in particular clause 4.1, is not only capable of being interpreted to mean that the use of the licence granted to the defendant is for its “personal perpetual, non-exclusive and non-transferable licence” to use it in RVSBK, solely and exclusively for purposes of upgrading and ensuring

⁷ 1975 (3) SA 385 (A) at 400 A-B.

that it is used to design and construct the aforesaid RVSBK kilns and no other kilns (like the VSBK in this instance) and for no other purpose unless with the written consent of the plaintiff. The plaintiff in paragraph 11 pleaded that the defendant on 19 April 2021 commenced to refurbish and modify **the VSBK kilns making use of its confidential intellectual property contrary** to the licence given to it which only allowed such use to the existing 18 RVSBK kilns. Such use, it stands to reason, was pursuant to the quotations furnished which included the **confidential intellectual property** covered by clause 4 of the agreement. The interpretation preferred by the plaintiff is not farfetched. Clause 4 may also be interpreted to cover the confidential intellectual property relied upon by the plaintiff. It remains for the plaintiff to prove or establish such. I am not in the least making a finding regarding the interpretation of the agreement. All I am saying is that such an interpretation may not be excluded. That accords with the *dictum* expressed by Corbett JA in *Dettmann, supra*.

[19] Clause 13.1 provides for a “breach” which concerns “unauthorised disclosure or publication or use of the confidential information”.⁸ The particulars allege that the defendant has made use of confidential information provided to it by the plaintiff and in that regard breached the agreement. Once that is established then the provisions of clause 13.2 are triggered and find application. The plaintiff would therefore be entitled to a “relief by way of an interdict, specific performance or otherwise”. For these reasons, the application for an exception in this regard stands to be dismissed.

[20] The defendant attacks the monetary claim on the basis that it is unclear how it is arrived at and no facts are pleaded thereof thus falling foul of compliance with

⁸ Clause 13 provides as follows:

13.1 Langkloof Bricks agrees that the unauthorised disclosure or publication or use of the Confidential Information may cause irreparable loss, harm and damage to Rowe. Accordingly, Langkloof Bricks indemnifies and hold Rowe harmless against any loss, claim, harm or damage, of whatever nature, suffered or sustained by Rowe pursuant to a breach by Langkloof Bricks or any of its related parties of the provisions of this Agreement.

13.2 Langkloof Bricks agrees that monetary damages will not be a sufficient remedy for such breach of the undertakings given in this agreement and accordingly, without prejudice to any other rights and remedies available to Rowe, agrees that Rowe shall be entitled to relief by way of interdict, specific performance or otherwise.

13.3 Langkloof Bricks agrees to pay Rowe’s costs of enforcing its rights under this agreement, including its costs on the attorney and own client scale, costs of counsel on brief and tracing agent’s fees.

Rule 18 of the Uniform Rules of Court. The defendant is therefore prejudiced by the manner in which the amount has been pleaded

[21] In *Stafford v Special Investigating Unit*⁹ Leach J, as he then was, said the following about Rule 18:

“This is also recognised by Rule 18(4) of the Uniform Rules of Court which requires a pleading to contain “a clear and concise statement of the material facts upon which the pleader relies for his claim . . . with sufficient particularity to enable the opposite party to reply thereto”. Moreover, Rule 18(10) requires a plaintiff suing for damages to set the amount in such a manner as will enable the defendant reasonably to assess the *quantum* thereof”.

[22] To me, the plaintiff has plead with sufficient particularity how the amount is arrived at. The plaintiff differentiates between the market value of its confidential intellectual property costs as 30% of the estimated project costs. The estimated project costs are R2 078 625.00, and the damages are 30% thereof which amounts to R623 587.00. I do not agree with the defendant therefore that in the manner pleaded, the damages are inadequate or inappropriately pleaded so as to be vague and embarrassing or lack the necessary averments to sustain the cause of action.

[23] In the result, I make the following order.

The exception is dismissed with costs.

M MAKAULA
Judge of the High Court

Appearances:

Counsel for Excipient:

Adv RG Buchanan SC

⁹ 1999 (2) SA 130 at 138 A-B.

Instructed by:

Le Roux Attorneys
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Date heard:

3 November 2022

Date delivered:

03 March 2023