REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2021/39559

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

11/09/2023
DATE

[redacted]
SIGNATURE

In the matter between:

ALL-GEN EVOLVE (PTY) LTD Plaintiff\Respondent

and

JAN-PIETER JANSE VAN RENSBURG Defendant\Excipient

JUDGMENT

STRYDOM, J

Introduction

[1] This matter concerns the consideration of an exception to the plaintiff's, All-Gen Evolve (Pty) Ltd (Plaintiff) particulars of claim taken by the excipient, Jan-Pieter

Janse Van Rensburg (Defendant) on the grounds that the plaintiff's particulars are vague and embarrassing leaving the defendants unable to plead thereto, and/or lack the averments necessary to sustain a proper cause of action. I shall, for ease of reference, refer to the parties in this judgment as cited in the main action.

[2] The exception is opposed by the plaintiff on the grounds that the particulars of claim, together with the annexures provide sufficient particularity in order for the defendant to plead thereto and there is accordingly no prejudice amounting to embarrassment. To properly contextualise the nub of the excipient's grounds, it is necessary to give an overview of the background facts.

Factual background

[3] The plaintiff has sued the defendant for payment of an amount of R1 400 518.98. The plaintiff sues as cessionary of Liberty Group Ltd, as well as other entities, (Liberty or cedent), to whom the defendant allegedly owed debts pursuant to a Financial Advisor Agreement (FAA or POC1), which entitled Liberty to advance and recalculate commissions paid to the defendant.

[4] Between 1 January 2014 and 31 August 2020, being the duration of the FAA, Liberty advanced unearned commissions to the defendant, and during the same period up until 6 February policies and/or products procured by the defendant lapsed due to non-receipt of premiums. The claim of the plaintiff is for the repayment of these commissions.

[5] The plaintiff places reliance on two cession agreements entered into between itself as cessionary and Liberty as cedent of a debt owed to Liberty by the defendant. The first cession was entered into in 2021 for the amount R892 258,00 according to the written first cession (although the plaintiff's particulars of claim refer to an amount of R790 683,00) with the second in 2022 for the amount R1 400 518.98. It should be noted that the exceptions taken are not aimed at this discrepancy and all references in this judgment to the first cession would be in relation to the amount of R790 583,00.

[6] The plaintiff alleges that Liberty ceded its alleged claim for payment of a sum of R790 683.00 to the plaintiff on 10 March 2021, alternatively, 14 July 2021 (first cession). Due to further escalations in the debt, the plaintiff alleges that it entered into a second cession with Liberty, on 13 September 2022, in terms of which the escalated outstanding debt in the amount of R1 400 518.98 was ceded by Liberty to the plaintiff.

[7] Initially, the defendant raised six grounds of exception but before this court, the defendant only persisted with the fourth and sixth ground referred to in the notice of exception. The fourth ground relates to how the outstanding balance was calculated and arrived at and more particularly to a "*Schedule of Commissions*" which was not attached to the particulars of claim, and which was defined in the FAA to mean:

> "a schedule containing the rates of Payments payable to Financial advisors on each type of contract offered by Liberty, as well as methods or formulae on how such Earnings are to be paid, as updated by Liberty from time to time."

[8] It is stated that the plaintiff has failed to:

9.1 attach any documents purporting to be a "*Schedule of Commissions*" to the particulars of claim;

9.2 plead the terms of any purported "*Schedule of Commissions*" in amplification of the amount that it alleges is owed by the defendant;

9.3 plead the total amount of unearned commissions which were allegedly advanced by Liberty to the defendant, and over what period this occurred;

9.4 plead which policies, in respect of which unearned commission was allegedly paid by Liberty to the defendant, lapsed or were cancelled and for what reason such occurred;

9.5 plead the amount of unearned commissions that were allegedly paid to the defendant by Liberty in respect of the lapsed or cancelled policies;

9.6 plead the reason for, and manner by which, "POC1" was allegedly cancelled.

[9] In brief, the complaint is that the plaintiff merely concluded in its particulars of claim that the defendant has become indebted to Liberty in amounts of R 790 683.00 and R1 400 518.98 respectively. How these amounts were calculated and arrived at was not pleaded by the plaintiff. According to the defendant, the plaintiff's particulars of claim for these reasons fail to sustain a cause of action and/or are vague and embarrassing with the result that the defendant is prejudiced in his ability to plead thereto.

[10] The sixth ground of the exception, as per the notice of exception, relates to the first and second written cessions from Liberty to the plaintiff. In paragraphs 7 and 8 of the particulars of claim, with specific reference to "POC3" (the first cession), the plaintiff pleads that Liberty ceded its alleged claim for payment of the sum of R 790 683.00 to the plaintiff.

[11] However, the plaintiff also pleads in paragraphs 12B and 12C of the particulars of claim, with reference to "POC4" (the second cession") that Liberty ceded its alleged claim for payment of a sum of R1 400 518.98 to the plaintiff. It is alleged that the plaintiff has failed to plead whether these two amounts ceded constitute different debts.The plaintiff only prays for judgment against the defendant in an amount of R1 400 518.98.

[12] *Ex facie*, the particulars of claim read with "POC3" and "POC4", the amounts of R 790 683.00 and R1 400 518.98 accordingly constitute the same debt allegedly owed by the defendant to Liberty, albeit, in different amounts. As per "POC4", the plaintiff accordingly purports to rely upon the cession of the claim for an amount which was already ceded by Liberty in terms of "POC3".

[13] It was stated *ex lege* that Liberty could not have ceded a claim that they no longer possessed any right to. It was then stated that, because of this, the plaintiff's particulars of claim fail to sustain a cause of action and/or are vague and embarrassing, with the result that the defendant is prejudiced in his ability to plead thereto.

[14] Before this court counsel for the defendant argued that the amount of R1 400 518.98 appears to comprise the same debt allegedly ceded to the plaintiff pursuant to first cession agreement. It was argued that the plaintiff purports to

rely on the cession of a claim for an amount that was already ceded by Liberty in terms of the first cession agreement. It was argued that this is inconsistent with the law that a party may not cede a claim they do not possess any right to. In other words, the defendant argued, that the sum of R 790 683.00 allegedly ceded to the plaintiff by Liberty in terms of the first cession agreement could not have been ceded to the plaintiff again in terms of the second cession agreement.

Issues to be determined

[15] Two issues need to be determined for the purposes of deciding this matter. The first is whether the plaintiff's particulars of claim are vague and embarrassing, and the second is whether the plaintiff's particulars of claim disclose a cause of action.

Discussion and analysis

[16] Dealing with the fourth ground first, it should be noted that by not attaching the *Schedule of Commissions*, it cannot be argued that no cause of action was pleaded by the plaintiff. The true complaint of the defendant is that he would not be able to establish how the amount claimed was calculated and arrived at. This does not relate to a cause of action not being pleaded but, depending on the circumstances, may render a pleading excipiable on the basis that it is vague and embarrassing, which is prejudicial to the defendant.

[17] Vagueness can be cured through the mechanisms of a request for further particulars for trial or a request for documents through Rule 35(12) and/or (14).[1] On 18 January 2023, the defendant delivered a notice in terms of Rule 35(12) and (14) requesting, *inter alia,* (i) the Schedule of Commission; (ii) the defendant's commission account and (iii) the demand made by the plaintiff for the defendant's advisor code commission statement and (iv) the defendant's commission account statement. The plaintiff delivered these documents to the defendant electronically on 3 February 2023.

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[1] See *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T) (*Nxumalo*).

[18] In *Nxumalo*[2], reference was made to "*ander dokumente*" which was not attached to a pleading. The question was raised whether this rendered the pleading vague and embarrassing. The court considered the question of whether the imprecision that arises from reference to "*ander dokumente*" could not be cured, as it would embarrass the pleader to such an extent that he or she would be prejudiced in a bid to plead. The court found as follows:

> "In my view, not. Firstly the defendant has several procedural remedies. The first such remedy is that whilst the defendant may not rely on the provisions of rule 18(6) because such documents are not characterised as a contract, the defendant could indeed rely on the provisions of Rule 35(12) and Rule 35(14) both of which entitle a litigant to call for such documents as may be referred to in a pleading, before pleading. It seems to me that no real prejudice would arise from whatever vagueness may arise from the reference to 'ander dokumente' since such may be readily cured by relying on the provisions of Rule 35(12) and Rule 35(14) of the Uniform Rules of Court. There is consequently no substance in that objection."

[19] Accordingly, in my view even if it could be found that the pleading was rendered vague and embarrassing by not attaching the *Schedule of Commissions*, the defendant was not prejudiced by this imprecision. The defendant exercised his procedural rights to obtain this document as well as further documents.

[20] Moreover, the plaintiff could, and in fact did, rely on a certificate of balance which was attached to the pleading which provided conclusive proof of the extent of the outstanding debt. In such a case where a certificate of balance states the exact figure of the debt claimed it cannot be argued that the particulars of claim are vague and embarrassing. The defendant can challenge the plaintiff's right to rely on the provision that stipulates that a certificate of balance constitutes "*conclusive proof*". This can be placed in dispute in a plea. In my view, the defendant is not embarrassed by the alleged vagueness of the particulars of claim and is also not prejudiced in this regard. The exact extent of the quantum of damages is a matter for evidence and if the plaintiff for whatever reason would not be entitled to rely on the certificate of balance, the plaintiff will have to prove its contractual damages.

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[2] Id at para 9.

[21] Accordingly, the fourth ground of exception should be dismissed.

[22] Now dealing with the sixth ground of exception. It became common cause before this court that the same debt cannot be ceded by a cedent twice. Cession involves a shifting of assets and the maxim *nemo plus iuris transfere potest quam ipse habet* (no person shall transfer more rights to another person more than he holds) rule applies. Essentially, after cession the cedent retains no rights that can be transferred a second time, and therefore a second cession of the same debt is not legally tenable. It is further clear in the pleadings that a portion of the amount of the debt ceded in terms of the second cession was already ceded in terms of the first cession. In the written second cession no mention of the first cession was made but it is stated in paragraph 6I of the particulars of claim as follows:

> "As a result of such further lapses ... or cancellations of policies and/or products an amount of R1 400 518.98 ... is reflected as a debit balance on the defendant's commission account as at 6 of February 2022, being an amount due and payable by the defendant to the cedent in terms of the consultant agreement."

[23] In paragraph 12A of the particulars of claim, it was stated as follows:

> "Pursuant to the first cession and as a result of the further lapses and/or cancellation of policies and/or products issued by the cedents pursuant to the applications procured and submitted by the defendant during the tenure of the agreement a further cession became necessary".

[24] The particulars of claim can be interpreted to mean that the initial amount which was the subject of the first cession increased from R790 683.00 to R1 400 518.98. The reason for this conclusion is the reference made to "*debit balance*" in the particulars of claim must be a reference to the total outstanding amount.

[25] The question that arises then is on what basis could Liberty have ceded the entire outstanding debt, which must have included the portion which was already ceded to the plaintiff? The court asked the legal representatives of the parties to file further heads on this question including on the question if the increased amount

which was capable of being ceded could form part of a lawful cession. The court raised the issue of severability.

[26] In the supplementary heads filed on behalf of the defendant reliance was placed on the matter of *Sasfin (Pty) Ltd v Beukes*[3] to argue that the second cession could not be enforced. It should be noted that in *Sasfin* the court was dealing with a contract that contained illegal terms. This is not the case *in casu.* What this court is dealing with is a cession that purported to cede more than what the cedent could have ceded considering the fact that a portion of the ceded claim was already ceded in terms of the first cession. The portion of the claim which was lawfully ceded, in my view, remains unaffected. In my view, it is not a matter of severability of illegal terms but rather a question as to what amount could have lawfully been ceded. This is the amount which then can be claimed together with the claim ceded in terms of the first cession.

[27] In any event, in considering the allegations made in the particulars of claim together with the second cession, it could well be that it was the intention of the parties that the second cession should replace the first cession. In both instances, the cedent and the cessionary were the same parties. Evidence as to the context in which the second cession was entered into can be led during the trial.

[28] The first principle when dealing with an exception is that if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.[4]

[29] As far as the defendant relied on the vagueness of the particulars of claim it should be restated that in order to succeed, the defendant had to prove that the particulars of claim, in respect of the plaintiff's whole cause of action, going to the root of the cause of action lacks, particularity to the extent that it is vague and that such vagueness causes embarrassment of such a nature that the excipient is seriously prejudiced.

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[3] *Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) (Sasfin).*

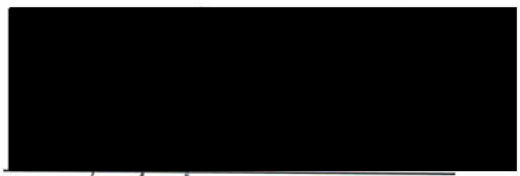
[4] See McKelvey v Cowen NO 1980 (4) SA 525 (Z) at 526 D-E.

[30] In my view, this is not the case in this matter. Sufficient particularity was provided for the defendant for the defendant to be able to deal with the allegations in the plea without being embarrassed. Even if the plaintiff could not place reliance on the second cession, which this court does not find, then the first cession remains intact meaning that a cause of action was established, albeit, for a lesser amount.

[31] Consequently, the sixth ground of exception should also be dismissed.

[32] The court makes the following order:

a. The defendant's exception is dismissed with costs.



R. STRYDOM, J
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

For the Plaintiff:	Ms. J. Scallan
Instructed by:	Gerings Attorneys
For the Defendant:	Mr. R. Bosman
Instructed by:	Andrew Garratt Inc
Date of hearing:	1 August 2023
Date of Judgment:	11 September 2023