


REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
<u>14/3/2025</u>	
DATE	 SIGNATURE

CASE NO: 25805/2021

In the matter between:

THE VAAL UNIVERSITY OF TECHNOLOGY

Excipient / Defendant

And

DR VUYO PEACH

Respondent / Plaintiff

JUDGMENT

DREYER AJ:

- [1] On or about 27 May 2021 the Respondent / Plaintiff instituted action against the Excipient / Defendant. For ease of reference the parties will be referred to as Respondent and Excipient respectively.
- [2] On 19 September 2023 the Excipient served a Notice of Exception on the attorneys of record of the Respondent on the ground that the Particulars of Claim lack the necessary averments to sustain a cause of action.
- [3] The Excipient sets out in the Notice of Exception that the Respondent's claim is for specific performance in terms of the agreement pleaded by the Respondent in the Particulars of Claim ('the pleaded agreement').
- [4] The crux of the exception raised by the Excipient is that whilst the Respondent seeks specific performance in terms of the pleaded agreement, the Respondent:
- 4.1 has failed to allege that he has complied with his obligations pleaded in paragraphs 6.2 and 6.3 of the pleaded agreement and therefore failed to allege that he complied with his full obligations as pleaded;
- 4.2 does not allege that the obligations pleaded in paragraphs 6.1 to 6.3 of the pleaded agreement are divisible and that the obligation pleaded in paragraph 6.1 is separate from the obligations pleaded in paragraphs 6.2 and 6.3.

[5] In the circumstances the Excipient set out the Particulars of Claim lack averments necessary to sustain a cause of action based on a claim for specific performance.

[6] It appears from the Particulars of Claim that the Respondent is seeking payment from the Excipient of his invoices rendered to the Excipient in respect of legal services rendered as an independent consultant to the Excipient totalling the sum of R4 976 518.14.

[7] The relevant portions of the Particulars of Claim are the following:

"4. The Plaintiff acting personally, was duly and properly instructed in his capacity as an independent consultant in terms of the terms of reference set out in Annexure "1" attached hereto and dated 14th of October 2019, which terms were approved on the 22nd of October 2019 at Vanderbijlpark, by the Defendant being duly represented by authorised representative, acting Deputy Vice-Chancellor Teaching, Learning and student Support, Prof CM van Der Bank in her capacity as the acting Deputy Vice-Chancellor Teaching, Learning.

5. ...

6. *The Defendant set out the terms of reference as set out more fully in Annexure "VP1". In terms thereof, Defendant indicated the terms of reference as follows: "This investigation is to clarify the negligence from the side of the university, and the consequences thereof. This investigation needs to clarify who is responsible for not meeting the said conditions". The scope of work would include, amongst others the following:*

- 6.1 *To conduct investigation on the alleged misconducts.*
- 6.2 *To determine whether or not those allegations are substantiated or not.*
- 6.3 *Make recommendations on appropriate steps to be followed in order to address those allegations that you shall have found substantiated.*
- 7. ...
- 8. ...
- 9. *In addition to the material terms as set out in the scope of work, and in order to facilitate the investigation, parts of the agreement were partially written, partially verbal and/or tacit: it was further agreed that:*
 - 9.1 *The Plaintiff would charge for his time spent at a rate of R3000/h (prior to 11 November 2020) and R4000/h (after 11 November 2020) and R8/km for travelling.*
 - 9.2 *The Defendant will pay the Plaintiff's invoices for reasonable fees for legal representation and legal services on rendering of the account, alternatively within a reasonable time but no later 30 days after rendering of the account.*
 - 9.3 *The Plaintiff will charge incidental interest at a rate of 7% for late payment on invoices rendered.*
- 10. ...
- 11. ...

12. ...
13. *The Plaintiff, duly, properly and in accordance with the aforesaid agreed, carried out his instructions received from the Defendant and rendered the representation and investigated as required.*
14. *The balance on the account of the Plaintiff's reasonable fees for legal representation and legal services as aforesaid, including incidental interest at a rate of 7%/annum, due and owing by the Defendant to the Plaintiff, pursuant to the aforesaid agreement amount to R4 976 518.14 as at 15 May 2021, are computed as follows:*
 - 14.1 *Invoice No 03/2020: R225 154.26, attached hereto and marked as Annexure "VP3". This invoice is made up of the total amount of R211 200 without interest and the additional amount of R13 954.26, which includes interest of 7% on the original amount.*
 - 14.2 *Invoice No 11/2020: R4 751 363.88, attached hereto and marked as Annexure "VP4". This invoice is made up of the total amount of R4 509 040.00 without interest and the additional amount of R242 323.88, which includes interest of 7% on the original amount.*
15. ...
16. ...
17. ...
18. *Plaintiff rendered his account to Defendant on the following dates:*

18.1 *Invoice No 3 of 2020: On 6 March 2020.*

18.2 *Invoice No 11 of 2020: On 12 May 2020.*

These invoices were sent to Defendant via email and the receipt thereof was formally acknowledged by Defendant through its finance departments on the dates set out hereinabove.

19. *Defendant has failed and or has neglected or refuses to make payment of the outstanding amount and to this end a letter of demand was issued via Plaintiff's attorneys of record for settlement thereof.*

20. ...

21. ...

22. *Notwithstanding the above and notwithstanding demand for payment, the Defendant has failed or refused or neglected to pay any portions of the outstanding amount to Plaintiff, despite demand."*

[8] A distinction has to be drawn between orders *ad pecuniam solvendam*, which relates to the payment of money and orders *ad factum praestandum*, which calls upon a person to perform a certain act or refrain from specific action.

[9] In *Ethekwini Municipality v Cooperativa Muratori & Cementisti – CM Di Ravenna Societa Cooperative* 2023 JDR 2053 (SCA) at paragraph 25 it was held that "*In ordinary language, one can undoubtedly say that an order enforcing a specific obligation due to be performed in terms of a contract, including one for payment of money, is an order for specific performance. However, that is not the sense in which the term has been used in our law consistently, judging from reported judgments, since the nineteenth century in the context of the discretion to grant or refuse an order for specific performance. In this sense the term is used to*

denote an order for the performance of a contractual obligation to do something; that is an order of 'specific performance ad faciendum', or more frequently, an order ad factum praestandum."

- [10] It is clear from the Particulars of Claim that the Respondent's cause of action is contractual and that he is seeking an order enforcing a contractual obligation *ad pecuniam solvendam*, i.e. an order for specific performance of a money claim.

- [11] In *McKensie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at page 23 the Appellate Division defined 'cause of action' to be "*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.*"

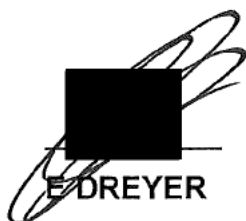
- [12] In *Vermeulen v Goose Valley Investments (Pty Ltd* 2001 (3) SA 986 (SCA) at paragraph 7 it was held that "*It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it can be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may) bad in law.*"

- [13] In *Living Hands (Pty) Ltd and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) at paragraph 15 the applicable principles when considering exceptions were set out as follows:
 - 13.1 In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by plaintiff to assess whether they disclose a cause of action.

- 13.2 The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion of thereof in an expeditious manner, or to protect oneself against embarrassment which is so serious as to merit the costs even of an exception.
- 13.3 The purpose an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.
- 13.4 An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclose.
- 13.5 An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
- 13.6 Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.
- 13.7 Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.
- [14] Having regard to the allegations pleaded by the Respondent in the Particulars of Claim as a whole, although not eloquently pleaded, it cannot be said the Respondent's claim is bad in law.

- [15] In essence the parties entered into a contract in terms of which the Respondent were to conduct an investigation. This is evident from the terms of reference set out in Annexure "VP1" attached to the Particulars of Claim. This is pleaded by the Respondent in paragraphs 4 and 6 of the Particulars of Claim. On a reading of Annexure "VP1" it is evident that the scope of work referred to therein and pleaded in paragraphs 6.1 to 6.3 of the Particulars of Claim merely outlined the boundaries and expectations of the investigation to be conducted, and is not the contract per se as the Excipient seems to make out in the exception.
- [16] As set out above the Respondent's cause of action is contractual and he is seeking an order for specific performance of a money claim. In this regard the Respondent pleaded the terms of the contract (paragraphs 4, 6 9, 11 and 12 of the Particulars of Claim) that he complied with his obligation (paragraph 13 of the Particulars of Claim) and non-performance by the Excipient (paragraphs 19 and 22 of the Particulars of Claim). In my view the exception that a cause of action is not disclosed cannot succeed.
- [17] I therefore make the following order:

1. The exception is dismissed.
2. The Excipient is to pay the costs of the application on scale B.



E DREYER

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date for hand down is deemed to be 14 March 2025.

Appearances:

Appearance for Excipient / Defendant:

Adv. A Laher

Instructed by:

Nadeem Mahomed Attorneys

Appearance for Respondent / Plaintiff:

Adv. FJ Nalane SC

Adv. T Moneri

Rerani Mdludla Inc.

Date of hearing:

5 March 2025

Date of Judgment:

14 March 2025