

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

23/7/08

DATE

SIGNATURE

**IN DIE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

CASE NO.: 23050/07

In the matter between

24/7/08

VAN WYK, FRANCOIS FERDINAND

Plaintiff

and

TCS INTERNATIONAL CONSORTIUM (PTY) LTD.

Defendant

CORAM: EBERSOHN AJ

DATE HEARD 23rd April 2008

JUDGMENT HANDED DOWN ON 24th July 2008

JUDGMENT

EBERSOHN AJ.

- [1] For the sake of convenience the excipient will be referred to in this judgment as the defendant and the respondent will be referred to as the plaintiff.

- [2] The plaintiff and the defendant concluded a written agreement on or about the 1st March 2003 in Johannesburg in terms whereof the plaintiff would, *inter alia*, render certain saving and consulting services for and on behalf of the defendant to Telkom SA Ltd. ("Telkom").
- [3] In return for the rendering of these services the defendant undertook:
- a) to pay the plaintiff R30 000,00 plus VAT per month on the last day of each month during which the services were rendered;
 - b) for all future savings to pay to plaintiff 1% of the gross savings achieved by Telkom, for a period of one year from the effective date that the future savings commenced ("the future savings"); and
 - c) for all retrospective savings to pay to plaintiff 2% of the gross savings achieved by Telkom, from the time that the Plaintiff commenced rendering the services in respect of the projects ("the retrospective savings").
- [4] The plaintiff alleged in paragraph 4 of the particulars of claim that the future and the retrospective savings would be payable by the defendant to the Plaintiff within a reasonable period of such savings having been calculated by the defendant, alternatively Telkom.
- [5] In paragraph 5 of the particulars of claim the plaintiff alleged that pursuant to the conclusion of the agreement:
- a) the plaintiff rendered the services in respect of the projects during the period 1 March 2003 until 30 June 2004;
 - b) the agreement was extended for four month periods, as agreed by the parties from time to time, from the 1 June 2003 until April 2004 and the plaintiff rendered the services during such extended period;
 - c) the "effective date" for the commencement of the future savings was the 9th November 2004.

- [6] In paragraph 6 of the particulars of claim the plaintiff alleged that the future savings as well as the retrospective savings have been calculated by the defendant alternatively Telkom, and as a reasonable period had expired subsequent to the calculation thereof, the defendant was in breach of the agreement by not paying the plaintiff. The plaintiff then set out certain amounts he alleged were due and owing to him by the defendant as gross future savings and retrospective savings and in paragraph 8 the plaintiff alleged that these amounts were due and owing.
- [7] In paragraph 8 of the particulars of claim the plaintiff alleged that the defendant also failed to effect payment of the 2% of the retrospective savings achieved by Telkom in respects of projects 2, 8, 13, 17 and 21 from 7 July 2006 to date of summons and in paragraph 10 alleged that the plaintiff had no knowledge as to what retrospective savings Telkom achieved with regard to the said projects and as these particulars fell within the knowledge of the defendant the plaintiff was entitled to a statement of account by the defendant with regard thereto and for debatement in respect of these issues.
- [8] The defendant noted five grounds upon which it excepted to the plaintiff's particulars of claim. The first ground was abandoned as the plaintiff amended the particulars of claim and only the costs thereof must be decided.
- [9] The Court now deals with the grounds of exception.

[10] **FIRST GROUND OF EXCEPTION:**

Abandoned.

[11] **SECOND GROUND OF EXCEPTION:**

- a) The defendant claimed that plaintiff alleged that he rendered services during various periods of time and then claimed for services rendered in respect of the projects until the 7th July 2008 and that this averment contradicted the averments in paragraphs 5.1 and 5.2 of the particulars of claim making the particulars of claim vague and embarrassing.
- b) It is clear, as Mr. Eyles, who appeared for the plaintiff, argued, that

upon a proper interpretation of the plaintiff's allegations, it was immaterial when the services set out in paragraphs 4.3 and 4.4 of the particulars of claim were rendered and there is no limit of time where future and retrospective savings were concerned.

- c) The defendant is accordingly able to plead to the allegations as far as this ground is concerned and the exception on this ground must fail.

[12] **THIRD GROUND OF EXCEPTION.**

- a) The defendant in his notice stated that the plaintiff did not allege when the amounts claimed in terms of the agreement between the parties would become due and payable and that plaintiff only alleged that future savings and retrospective savings achieved by Telkom would be payable by the defendant to the plaintiff within a reasonable time of such savings having been calculated by the defendant, alternatively Telkom, and that although the plaintiff stated in the particulars of claim that a reasonable time had expired and that the amounts were due and owing, the defendant did not know and could not determine if the alleged period was a reasonable period after such calculations have been done and as far as the plaintiff's allegation that the defendant thus breached the agreement went it was vague and embarrassing.
- b) This Court differs from Mr. du Plessis who appeared for the defendant, and the defendant can plead thereto even by just denying that the period was a reasonable period and the exception on this ground must also fail.

[11] **FOURTH GROUND OF EXCEPTION.**

- a) The defendant in his notice stated that it was not clear to the defendant what the meaning of the reference "**from 7 July 2006**" was "**and it appears that the averments in this paragraph are contradictory to paragraph 5.2 of the particulars of claim. These averments are therefore vague and embarrassing.**"
- b) If the defendant would read the particulars of claim properly it will understand what the plaintiff's case is and as there is no merit in this ground the exception on this ground must also fail.

[12] **FIFTH GROUND OF EXCEPTION**

- a) In this ground the defendant averred that the plaintiff did not make any allegation in the particulars of claim entitling the plaintiff to a statement of account, debatement thereof and judgment for the amount found owing.
- b) The plaintiff's action is based on contract and impliedly, at least, the plaintiff, having made the necessary allegations regarding the contract, is entitled to the claimed relief namely a statement, debatement thereof and for judgment in the amount found to be owing and the exception on this ground must also fail. (See **Rectifier and Communication Systems v Harrison** 1981 (2) SA 283 (CPD).)

[13] With regard to the amendment of the summons regarding the first ground of exception I am of the opinion that any costs issue in that regard which should be decided by a Court, must be reserved for determination by the trial Court.

[14] The following order is accordingly made:

1. The exception is dismissed with costs.
2. The costs, if any, regarding the amendment of the plaintiff's particulars of claim regarding ground 1 of the exception is reserved for determination by the trial Court.


P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

Excipient's counsel:

Instructed by:

Adv. R. DU PLESSIS SC

GERBER ATTORNEYS

Respondent's counsel

Instructed by

Adv. A.J.EYLES

CLIFFE DEKKER INC.