

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 026742-2022

- (1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No
(3) REVISED: Yes / No

Date: 28 September 2023

WJ du Plessis

In the matter between:

JOHANNA HESTER ALBERTA BOTHA

FIRST PLAINTIFF

GREY DOT CONSULTING (PTY) LTD

SECOND PLAINTIFF

**NATIONAL EDUCATION GROUP LABOUR
(PTY) LTD**

THRID PLAINTIFF

NATIONAL EDUCATION GROUP HOLDINGS

FOURTH PLAINTIFF

and

ZANRO FASHION CC

FIRST DEFENDANT

ELZAAN VAN DER MERWE

SECOND DEFENDANT

JUDGMENT

DU PLESSIS AJ

- [1] This is an opposed exception application where the court is tasked to determine whether or not the Plaintiffs have pleaded sufficient averments to sustain a cause of action.
- [2] The First Plaintiff is a businesswoman and director of the Second, Third and Fourth Plaintiffs. The First Defendant is a closed corporation, and the Second Defendant has the majority membership in the First Defendant. The parties will be referred to as “the Plaintiffs” and “the Defendants”.

Background

- [3] The Plaintiffs are claiming a breach of a partly written, partly oral agreement concluded by the authorised representatives of both the Plaintiffs and Defendants. In terms of this agreement, they state that the Defendants had to render services to the Plaintiffs on request, specifically regarding the planning and organisation of the First Plaintiff's wedding and other social events of the Second to Fourth Plaintiffs.
- [4] The Plaintiffs assert that the written part of the agreement is contained in the invoices and proof of payments attached to the particulars of claim.¹ The terms of these various invoices are deemed as specifically pleaded. Furthermore, the Plaintiffs assert that the further express, alternatively implicit, alternatively tacit terms of the agreement were that the Defendants would render invoices to the First Plaintiff or her agent and that the Plaintiffs would pay such invoices to retain the Defendants' services.²
- [5] The total amount paid by the Plaintiffs amounts to R1 283 237,20 and is set out in the particulars of claim.³ The Plaintiffs aver that they complied with their obligations

¹ Para 4.1 of the amended particulars of claim.

² Para 4.2 of the amended particulars of claim.

³ Para 4.3 of the amended particulars of claim.

in terms of the agreement by paying the invoices rendered by the Defendants. However, the defendants breached the agreement by failing and/or refusing to perform the services and render the goods in terms of the agreement. Thus, the First Plaintiff cancelled the agreement via a WhatsApp message on 22 February 2022, on behalf of the Second to Fourth Plaintiffs.

The pleadings

[6] Plaintiffs issued summons against the Defendants on 21 September 2022 for damages of R1 283 237,20. The Defendants served a notice of exception to the Plaintiffs' initial particulars of claim in that the partly written portion of the contract was not annexed to the particulars of claim, and that it was not properly pleaded. The Plaintiffs amended their particulars of claim to correct that. Once so amended, the Defendant served another notice of exception, the subject of this application.

[7] The amended pleadings read as follows:

4.1 On/or about 02 January 2020 a duly authorised agent of the Plaintiffs, known as Rentia Coetzer, entered into a partly written and partly verbal agreement with the 2nd Defendant as the majority member and duly authorised representative of the 1st Defendant, whereby the Defendants would render its services at the Plaintiffs' special instance and request, with specific reference to the planning and organisation of the 1st Plaintiff's wedding as well as other social events of the 2nd to 4th Plaintiffs. The various invoices, attached as annexures "A1" to "G2", serves as the written part of the agreement and should be deemed as if specially pleaded herein.

4.2 The further express *alternatively* implicit *alternatively* tacit terms of the agreement were that the Defendants would render various invoices to the 1st Plaintiff or her agent, and the Plaintiffs would henceforth continue to perform in accordance with the various invoices in order to retain the services of the Defendants.

[8] Paragraphs 4.3 to 4.9 contains various allegations about how the Defendants failed to perform in terms of the agreement.

[9] The Defendants state that the Plaintiffs' amended particulars of claim does not contain the necessary averments to sustain a cause of action because:

- i. The Plaintiffs plead in paragraph 4.2 that the only terms of the agreement were that the Defendants would render various invoices to the First Plaintiff or her agents and that the Plaintiffs would henceforth continue to perform in accordance with the various invoices to retain the Defendants' services.

- ii. The Defendants understand the Plaintiffs' claim to be that the Defendants had an obligation to arrange certain events, including the First Plaintiff's wedding, and to provide the Plaintiffs with invoices without stating when the services were rendered and the goods to be delivered by the Defendants.
- iii. The Defendants allege that an agreement to render services and deliver goods implies that the services must be rendered by a specific date and that the goods were to be delivered by a specified date.

[10] Thus, the Defendants' exception is based on the Plaintiffs' failure to plead by when the services had to be rendered and the goods had to be delivered. Since there is no time limit, they cannot claim that the Defendants did not comply.

[11] The Plaintiffs claim that the Defendants focus only on specific paragraphs, not the particulars of claim as a whole. They aver that their cause of action is clearly set out: a partly written, partly oral agreement, in terms whereof the Defendants would render services and goods to the Plaintiffs. The Defendants' contention that there was only one obligation on them, namely to render invoices, is also wrong. Furthermore, the timing by when the services had to be rendered can be deduced from a holistic reading of the pleadings: services will be rendered at the "special instance and request" of the Plaintiffs. There was thus a continuous obligation on the Defendants to provide services, as stated in paragraph 4.2 of the particulars of claim that the Plaintiffs would "retain the services of the Defendants". The Defendants must not only render invoices. The Plaintiffs argue that what the Defendants are trying to do by raising an exception is to challenge a term of the agreement factually, and that this is for the trial court to determine.

[12] This court, they state, must consider whether there are enough facts pleaded, on which evidence can be led, to ascertain what the parties agreed to in terms of the Defendants' performance - a continuous performance following the Plaintiffs' payment of the invoices. The Plaintiffs argue that the Defendants have not been prejudiced and they can plead to the Plaintiffs' particulars of claim.

[13] The Defendants disagree. They state that the contract pleaded is a *locatio conductio operis*, namely the letting and hiring of work. Such a contract has three basic terms, namely the work to be performed; the remuneration payable, and the time of the performance. This means that the Plaintiffs have failed to plead by when the services were to be rendered and the goods to be delivered in relation to the services. Thus, the Plaintiffs did not make out a case of how the Defendants failed to comply with the agreement, as no time was set by which performance must be rendered, or the time for performance had not yet arrived. Thus, they cannot breach a contract for the delivery of services when they do not know by when to deliver such service.

The law

[14] The purpose of pleadings is to define the pleader's case. A failure to disclose or reveal a cause of action or defence in the particulars of claim or the plea is a serious fault in such a pleading. It can be excepted to. An exception is a legal objection to the opponent's pleading and a defect inherent in the pleading. It is governed by rule 23(1) of the High Court Rules. It serves as a way of objecting to pleadings which are not sufficiently detailed, lack clarity, is incomplete and thus embarrassing, and which, importantly, affect the ability of the other party to plead to the allegations contained therein.⁴

[15] There are two types of exceptions: the pleading is vague and embarrassing, or; the pleading lacks the averments to sustain a cause of action (or a defence).⁵ The question before this court is whether the Plaintiffs have pleaded sufficient averments to sustain a cause of action.

[16] When the court considers an exception, it must treat the allegations in the particulars of claim as true for the moment.⁶ The pleadings are thus considered as they stand, without reference to any external facts.⁷ The plaintiff is confined to the facts alleged

⁴ *Bowman Gilfillan Inc and Another: In re: Minister of Transport* [2018] 3 All SA 484 (GP).

⁵ *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W).

⁶ *Bendrew Trading v Sihle Property Developers and Plant Hire* [2021] ZAMPMBHC 37 par 6.

⁷ *Ibid* par 7.

in the particulars of claim.⁸ These facts are the material facts (*facta probanda*) that are necessary to give rise to an enforceable claim. This, in turn, will depend on the nature of the claim involved.

[17] Substantive law will determine what are the *facta probanda* in a particular case. It does not require that the evidence to prove each fact be pleaded, but rather, the facts that need to be proven.⁹ Thus, Herbstein & Van Winsen¹⁰ concludes that if evidence can be led to disclose a cause of action alleged in the pleadings, the pleading is not excipiable. It is only excipiable if no evidence led on the pleading can disclose a cause of action.

[18] The pleadings must be benevolently interpreted when considering whether a cause of action has been established. They must be considered as a whole, with no one paragraph read in isolation. The excipient must show that the pleading is excipiable on every interpretation of the pleadings.¹¹ When dealing with a dispute about contractual terms, the precise terms of a contract will not be decided on exception for this reason.¹²

[19] In the end, the ultimate test for whether the exception should be held is whether the excipient will be prejudiced.¹³ This is to prevent parties from taking technical objections without real substance.

Conclusion

[20] Considering the pleadings as a whole, I am satisfied that the Plaintiff has pleaded the terms of the contract, including that the Defendants would render the services “at the special instance and request” of the Plaintiffs (with specific reference to a

⁸ *First National Bank of South Africa v Perry NO 2001 (3) All SA 331 (A)*.

⁹ *McKenzie v Farmer's Co-operative Meat Industries Ltd 1922 AD 16 at 23*.

¹⁰ Herbstein & Van Winsen, *The Civil Practice of the Superior Courts of South Africa*, 2022, p 23.

¹¹ See also *Pets-Warehousing and Sales CC v Dowsink Investment CC 2000 (3) 833 (E) at 839G-H*.

¹² *CCA Little & Sons v Niven NO 1965 (3) SA 517 (RA) at 522H*.

¹³ *Trope v South African Reserve Bank [1993] ZASCA 54 at 211B*.

wedding and social events). The precise terms of the contract is for the trial court to determine.

[21] Thus, accepting that the averments are true for deciding the exception, these averments are specific enough for the Defendant to enter a plea (that, for instance, can include a defence that the payment was not due). There is based on this, no prejudice should the exception be dismissed.

Order

[22] I, therefore, make the following order:

1. The exception is dismissed with costs.



WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Ms C Jacobs
Instructed by:	Hartzenberg Incorporated
Counsel for the respondent:	Mr R Ellis
Instructed by:	Wolvaardt Inc
Date of the hearing:	05 September 2023
Date of judgment:	28 September 2023