IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D369/2023

In the matter between:

SHAYNE EDWARD MCGEE **PLAINTIFF**

and

RHO-TECH **DEFENDANT**

ORDER

The following order is granted:

1. The defendant is ordered to render an account in respect of plaintiff's commissions within 15 days from date of this order.
2. The defendant must pay costs of the action.

JUDGMENT

HLATSHWAYO AJ

Introduction

[1] Before me is an action instituted by the plaintiff against the defendant for rendering an account and debatement of that account. The dispute has its genesis to the alleged outstanding commission arising out of employment agreement between the parties, which was entered into around 11 June 2018.

[2] The material terms of the agreement between the parties were that the plaintiff would be employed by the defendant as the Account Manager and would be assigned customers for purposes of securing sales and maintaining contacts with those clients. When work has been done for the customer, the plaintiff would be entitled to commission of 7 per cent on the gross profit earned from the sales, after the said customer has made payments and upon completion of the defendant's internal processes.

Background

[3] It is not in dispute that on 14 May 2020, plaintiff was suspended and was instructed to remain at home. This was at height of the COVID-19 pandemic, and the employment relationship between the parties thereafter ended around June or July 2020.

[4] There is some history of litigation that ensued subsequently. It is common cause that the plaintiff issued summons in Durban Magistrate's Court (Magistrate's Court), claiming commission for sales in respect of a client known as Subtech Pty Ltd. In addition to this claim for commission, the plaintiff also sought an order compelling the defendant to render an account and for debatement of that account.

[5] The plaintiff subsequently obtained judgment in respect of the outstanding commission; but, was unsuccessful on the relief for the defendant to render the account and for the debatement of that account. The Magistrate's Court found that it had no jurisdiction to determine this relief.

[6] I digress to mention that the plaintiff pursued further action by referring the dispute to the Commission for Conciliation, Meditation, and Arbitration (CCMA), and thereafter referred the dispute to the Labour Court alleging unfair dismissal. The litigation in the labour court is still pending.

[7] In this court, the plaintiff alleges that, as of May 2020, he had no access to the records of the defendant and is not in possession of sales agreements, records of profits earned, or payment by customers.

Summary of evidence

[8] The plaintiff was the only witness that testified in support of his case. He testified about the process by which customers were allocated to him. Once customers are assigned, they would be entered in his name to a programme or app known as Customer Relations Management (CRM). In this programme the profile of all existing and new clients were loaded.

[9] The purpose of loading information into the CRM programme was to manage customer relations. In this programme, quotations and responses from customers would be entered. If a customer agrees to a purchase order, the status that will be reflected on the CRM would be that the contract is "successful" or "won".

[10] Following this a job cut would be completed and a meeting of all relevant parties including the plaintiff would be scheduled to discuss the parameters of the job. This meeting would also address and approve the costs associated with the project.

[11] When it comes to payment by customers, the defendant would either open a credit facility for the customer or the relevant customer would pay in cash. However, the records of payments by customers were not recorded on the CRM system but were kept by the defendant's administration section.

[12] The plaintiff's responsibility was to record quotations and the sale on the CRM system, and a copy would be made available to the Sales Manager. The defendant debtor's clerk and administrative staff would allocate costs of the job in question on the system known as Jobsys. This is then be integrated into the Sage accounting system from which an Excel sheet reflecting clients and commission would be printed. If plaintiff is satisfied with the information, he would affix his signature thereon. If unsatisfied, he would raise the necessary query. Once all queries are resolved, the Sales Manager would sign the spread sheet, the General Manager and Chief executive Officer would respectively sign, authorising payment of the plaintiff's commission.

[13] The plaintiff's case is that, when he was suspended on 14 May 2020, he had no access to the defendant's CRM system nor did he have access to other records of the defendant. However, prior to his suspension, there were jobs and orders that had been received. While the plaintiff retained copies of quotations and email correspondences, he lacked access to the details of the prior jobs.

[14] The plaintiff further alleged that the terms of the agreement in the particular section "F" outlines the procedure regarding sales however, not all the procedures were followed and the details of quotations and sales waited until end of the month. Nevertheless, he would be entitled to and did receive commission when it was due.

[15] During cross-examination, the plaintiff admitted albeit reluctantly that his contract reflects the name of the defendant on the top right corner as a close co-operation. The same close co-operation with registration numbers were reflected on the pay slips that he received monthly. He thus conceded that he knew the description of his employer and that the defendant was incorrectly cited as a sole proprietary in the particulars of claim.

[16] He further conceded that the salary advices which were handed to court as exhibit "D", was a statement reflecting his commission. He also admitted that he did not discover pleadings for his Labour Court case and the audio recordings of the initial oral agreement with the defendant which he alleges contained further terms of the agreement on commission. The plaintiff then closed his case.

[17] The defendant also closed its case without calling any witnesses. It is appropriate at this stage to note that the defendant in its plea raised two special pleas of res judicata and prescription. These special pleas were not vigorously pursued during submission but were also not withdrawn. I am therefore constrained to briefly consider them.

Res judicata

[18] The defendant submitted in its plea that the plaintiff's claim was dispositively finalised in the Magistrate's Court where the plaintiff's claim for the same relief was dealt with. It was submitted that in the Magistrate's Court, the defendant pleaded and denied the plaintiff's right to such relief, and such relief was dismissed.

[19] It is trite that the basic requirements for the plea of res judicata to be successful, the cause of action and relief claimed in the finalised case must be the same as in the subsequent case. The principles underpinning the plea of res judicata has been thoroughly judiciary considered in numerous cases. In *Smith v Porritt*,[1] the following was said regarding this plea:

'Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same and that the same issue must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an

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[1] *Smith v Porrit and Others* [2007] ZASCA 19; 2008 (6) SA 303 para 10.

essential element of the judgment on which reliance is placed.'

[20] In *Democratic Alliance v Brummer*,[2] the court outlined how this issue must be approached. It held:

'The first question is to determine whether, as a matter of fact, the same issue of fact or law which was determined by the judgment of the previous court is before another court for determination. This is so because if the same issue (*eadem quaestio*) was not determined by the earlier court, an essential requirement for a plea of res judicata in the form of issue estoppel is not met. There is then no scope for upholding the plea.'

[21] In this matter, the plaintiff submitted that the Magistrate's Court dealt with and granted the plaintiff's claim in respect of a client known as Subtech (Pty) Ltd (Subtech). However, the Magistrate's Court did not deal or make a finding on the merits or demerits of the claim for rendering an account.

[22] When this was pointed out, counsel for the defendant conceded that the Magistrate's Court only dealt with the abovementioned client. Indeed, it is clear, from the particulars of claim filed in the Magistrate's Court[3] and from the evidence of the plaintiff, that the claim in the Magistrate's Court was in respect of client known as Subtech from which judgment was granted.

[23] It is also undisputed that the claim for rendering of an account was dismissed by the Magistrate's Court for lack of jurisdiction. As no determination was made regarding the merits of the rendering an account, this Court cannot conclude that the same issue is now before it. Consequently, there is no basis for the defendant's special plea of res judicata, and it was unnecessary for the defendant to persist with this plea.

Prescription

[25] The second special plea raised by the defendant is based on prescription. The

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[2] *Democratic v Brummer* [2022] ZASCA 151 para 13.
[3] See exhibit "A" at 10.

defendant submitted that it received summons from the plaintiff in January 2023, and that any claim that arose before 19 January 2020 have expired through prescription. The defendant further contends that the plaintiff's request for rending an account would be limited to any period after January 2020 until the plaintiff left employment in July 2020.

[26] This special plea seeks to attack claims, if any, for period prior to January 2020. Section 11*(d)* of the Prescription Act 68 of 1969 (the Prescription Act) provides that a debt prescribes after three years from the date the debt is due. However, the plaintiff's contention is that service of the summons in this matter was on 8 February 2023 and this service interrupts prescription.

[27] Section 15(1) of the Prescription Act deals with judicial interruption of prescription and provides that the 'The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt'.

[28] Accordingly, the service of summons upon the defendant on 8 February 2023 interrupted any prescription for claims arising three years prior to this date. However, the plaintiff's reliance on the above interruption does not address the defendant's complaint. The defendant's plea is directed at claims emanating before January 2020 which is not covered by the interruption. It is nonetheless obvious from the evidence and documents filed that plaintiff issued summons in the Magistrate's Court in October 2020 which simply means that claims arising three years before the magistrate's court summons were valid. Again, counsel for the defendant abandoned this plea during submission despite the earlier persistence with this defence. Consequently, there is no substance to the defendant's special plea.

Discussion on merits

[29] The defendant contended that the plaintiff's citation of the defendant as a sole proprietor instead of a close corporation is incorrect. This is despite the plaintiff's full

knowledge of his employer and the defect brought to the attention of the plaintiff as far back as 2020 when the defendant pleaded in the Magistrate's Court. Before this court, the defendant again disputed its citation in its plea filed in May 2023 and to date no amendment was sought. The defendant contended that this defect is fatal to the plaintiff's claim.

[30] It is abundantly clear that plaintiff has either had knowledge or the very least ought to have known the description of the defendant for a very long time. The contract of employment he signed on 11 June 2018 bears the details of the defendant as a close corporation bearing its registration number and not a proprietor. The pay slips he admitted receiving monthly, also reflects the details of the close corporation. Moreover, in the pleadings both in the Magistrate's Court and subsequently in this court, the defendant persistently denied that its citation was correct and this should have sounded alarm bells to plaintiff regarding the wrong citation. Accordingly, the plaintiff has had ample opportunity to remedy this defect and his failure to rectify it is simply inexplicable.

[31] Counsel for the plaintiff submitted that the employment contract lists a number of subsidiaries of the defendant. In his evidence, the plaintiff also testified that he worked on clients for different subsidiaries and therefore took a cautious approach. This submission is unsound. Subsidiaries listed by the defendant has no legal status in light of an unambiguous description of the defendant as a close corporation and counsel correctly did not take the argument further. She submitted that, in the event of the court finding that the defendant was not correctly cited, as I have now found, she applies in terms of Rule 28 for the amendment of the particulars of claim to reflect the correct citation of the defendant as a close corporation. This application is opposed by the defendant.

Amendment

[32] It is apposite to restate to approach of our courts when faced with the application for an amendment. This court enjoys a wide discretion to grant the amendment in order to facilitate a proper ventilation of disputes unless the defendant will suffer prejudice that

cannot be cured by an appropriate costs order. In this regard, I can do no better than to borrow from the words of Ngcobo J in *Affordable Medicines Trust and Others v Minister of Health and Another*,[4] where he said:

'The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO.* The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for cost, or "unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'

[33] More pertinent to this matter, the remarks by Heher JA in *Blaauwberg,*[5] are important. He said the following:

"While the entitlement of the debtor to know it is the object of the process is clear, in its case the criterion fixed in s 15(1) is not the citation in the process but that there should be service on the true debtor (not necessarily the named defendant) of process in which the creditor claims payment of the debt. The section does not say '... claims payment of the debt *from the debtor'*. Presumably this is so because the true debtor will invariably recognise its own connection with a claim if details of the creditor and its claim are furnished to it, notwithstanding any error in its own citation."

[34] The premise of the application before me is that summons was served at the correct address of the close corporation. The defendant has defended the action throughout and has engaged with every step of the litigation including in the Magistrate's Court as far back as in 2020. There is no prejudice to be suffered by the defendant should the amendment be allowed. Counsel for the defendant on the other hand argued that there was no application for amendment since plaintiff insist that the citation of the defendant was correct, and the application is conditional upon the court's finding that the defendant was incorrectly cited.

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[4] . *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 9.

[5] *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2003] ZASCA 144; 2004 (3) SA 160 (SCA) para 18. See also *Foxlake Investments (Pty) Ltd t/a Foxway Developments (Pty) Ltd v Ultimate Raft Foundation Design Solutions CC t/a Ultimate Raft Design and Another* [2016] ZASCA 54 para 13.

[35] The argument by the defendant has no substance. There is nothing that militates against seeking a relief in the alternative. Nonetheless, the defendant has not alleged any form of prejudice or mala fides as outlined in *Affordable Medicines*[6]. At best the defendant alleges that the misdescription by the plaintiff was not inadvertent but was deliberate considering that the correct description was always in his knowledge. This submission fails to take into account that A party may be under a mistaken belief that the citation is correct. There is no requirement in terms of Rule 28 for Plaintiff to show that failure to correctly cite the defendant was not deliberate.

[36] From the facts, there is no doubt that the defendant recognised its connection with the claim upon receipt of the claim hence it has engaged with the claim in every step of the litigation and as per the evidence of the plaintiff, it also paid his judgment from the Magistrate's Court arising out of the claim. There is therefore no prejudice to be suffered by the defendant as a result of the amendment and the application for amendment is accordingly granted.

Rendering and debatement of the account

[37] I turn now deal with the main reason for the action before me. It is trite that the plaintiff is entitled to receive an account if he establishes a right to it whether by virtue of a contract or by fiduciary relationship, some contractual circumstances or terms having a bearing on the account he seeks, and the defendant's failure to render an account.[7] In this matter I have no hesitation that, from the nature of the contract between the parties and from plaintiff's evidence that he had performed work prior to his suspension, a contractual right to an account exists. There is however some dispute whether the plaintiff has established some basis that he requires the account and whether he was provided with an account.

[38] It was argued that plaintiff was required to comply with sales administrative

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[6] *Affordable Medicines* above fn 5 para 32.
[7] See *Doyle and Another v Fleet Motors P E (Pty) Ltd* 1971 (3) SA 760 (A).

procedures referred to under section F of the contract in order be entitled to commission. It was submitted that his entitlement has nothing to do with the CRM programme and the plaintiff cannot rely on the oral agreement. The defendant led no evidence in support of the submission that failure to comply with the said procedures disentitled the plaintiff to his commission and that he was not paid commission. The agreement itself provides no such consequence. The plaintiff on the other hand testified about a significantly similar procedure which resulted in payment of his monthly commission during the duration of his employment with the defendant. Contrary to the defendant's submission, the CRM programme, as described by the plaintiff, is specifically recorded in the agreement where orders were recorded.[8]

[39] The defendant further submitted that the plaintiff failed to put up documents or clients showing that he is entitled to commission. The evidence of the plaintiff is that he activated certain jobs and received orders prior to his suspension and that he is in possession of some of the documents. The demand by the defendant that he must show that he is entitled to commission is without merit. The undisputed evidence of the plaintiff is that he had no access to the records of the defendant where the details of his clients are kept including payments by those clients to the defendant. The very nature of the relief sought is rendering an account and the subsequent debatement thereof. To expect the plaintiff to prove his entitlement to commission even before the account is rendered is irrational.

[40] It was the defendant's submission that it had rendered an account to the plaintiff as alleged in its plea. In support of this contention the defendant placed before court salary slips of the plaintiff[9] reflecting payment of his commission. The defendant argued that because the plaintiff failed to replicate, his relief is not for the rendering of an account but rather that the account provided is incorrect or insufficient. It was further submitted that the plaintiff failed to separate the relief and claimed both an account and debatement. The only time debatement may be ordered is where an account has already been

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[8] See exhibit B page 10 paragraph F (v).
[9] See exhibit D at 1-7.

received but is incorrect or insufficient. There is nothing in the plaintiff's case to suggest that the account he received was inadequate. Reliance was placed on *Video Parktown North (Pty) Ltd.*[10] Which quoted *Doyle*[11] to conclude that the right to an account and the adequacy of the account may be dealt with separately.

[41] Indeed from the analysis of the leading authorities including *Doyle*,[12] it is clear that the right to receive an account must be separated from the accuracy and adequacy of the account. Clearly debatement would occur where the account is inaccurate and not from failure to account. Depending on the circumstances, these claims may be dealt with in stages. The fact that Plaintiff has not separated the relief sought is not a bar to the court ordering the rendering of an account especially where it finds that the defendant has an obligation to do so. This approach is consistent with the observations of Holmes JA[13] in cases where plaintiff is seeks an account and debatement. He said the following:

"2. On proof of the foregoing, ordinarily the Court would in the first instance order only the rendering of an account within a specified time. The degree or amplitude of the account to be rendered would depend on the circumstances of each case. In some cases it might be appropriate that vouchers or explanations be included. As to books or records, it may well be sufficient, depending on the circumstances, that they be made available for inspection by the plaintiff. The Court may define the nature of the account.

7. In general the Court should not be bound to a rigid procedure, but should enjoy such measure of flexibility as practical justice may require."

[42] The duty to account is a substantive legal duty and is fulfilled when the party obliged to account explains his actions and justifies his conduct.[14] In this case the nature of the account sought by the plaintiff and the question whether the defendant has explained and

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[10] *Video Parktown North (Pty) Ltd* v *Paramount Pictures Corporation, Video Parktown North (Pty) Ltd* v *Shelburne Associates and others, Video Parktown North (Pty) Ltd* v *Century Associates and others* 1986 (2) SA 623 (TPD) at 638E-G.

[11] *Doyle* above fn 8.

[12] Ibid.

[13] Ibid.

[14] *Doyle* above fn 8 at 763.. See also *Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and Another.* [2023] ZAGPJHC 475.

justified its actions is best determined by having regards to the pleadings, the evidence of the plaintiff, the agreement and other documents.

[43] The plaintiff, in his testimony has outlined the process that was followed resulting in payment of his commission. I do not intend to repeat his evidence. It would suffice to mention that the process he outlined is not in conflict with the sales procedure in the agreement and is in fact complementary in certain respects. Specifically, section F (ii) dealing with quotations and F (viii) dealing with capturing of information to the CRM programme is the similar to evidence. The plaintiff's evidence then tallies with paragraphs 5A (b), 5A(C), 6(b)and 6(C) of the particulars of claim which deals specifically with his entitlement to a percentage of commission on the profit earned on the sales and from the resultant payments by customers. This is exactly the account the plaintiff calls for and the defendant has a duty in terms of the agreement to render.

[44] The defendant's submission that it has rendered an account in the form of payslips is flawed and unsustainable. It does not constitute an account consistent with its duty in terms of the contract of employment to render an account on commission earned by the plaintiff after the latter has, inter alia, secured orders from customers and payment from those customers to the defendant in respect of the said orders. The payslips do not have orders the plaintiff has secured, payments made by customers, profits earned from that work for the plaintiff to be able to calculate his commission. They also do not address the undisputed processes followed by the defendant in recording the sales on its CRM system, Jobsys and the Sage accounting programmes. It was the plaintiff's evidence that from these programmes an excel sheet showing how the commission was earned would be generated. In relying on the payslips, the defendant expects the plaintiff to accept its mere say so regarding commissioned earned.

[45] I am satisfied that the plaintiff has established that he is entitled and needs an account regarding his commission. The defendant has failed to account and has failed to justify its conduct. The defendant must therefore be ordered to render an account.

Order

[46] In the result, the following order is made:

1. The defendant is ordered to render an account in respect of plaintiff's commissions within 15 days from date of this order.
2. The defendant must pay costs of the action.

[redacted]

Hlatshwayo AJ

Appearances

Counsel for the Plaintiff: Ms. Bramdhew
Instructed by: Henwood Britter and Caney
Phone: (031) 303 3621
Email: rbd@henwoodbritter.com

Counsel for the Defendant: Mr. D William
Instructed by: John Dua Attorneys
Phone: (031) 701 5000
Email: john@dualegal.co.za

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