

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 23052/2022

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

06 MARCH 2023
DATE


SIGNATURE

In the matter between:

JEROME REUBEN SAFI

Plaintiff

And

GASCOIGNE RANDON AND ASSOCIATES

Defendant

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and uploading to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 06 March 2023.)

JUDGMENT

MIA J:

[1] The defendant excepts to the plaintiff's particulars of claim alleging that it lacks the averments necessary to find a cause of action. The plaintiff was the purchaser of immovable property and claimed the amount of R889 308.50 from

the defendant, the conveyancing attorney responsible for the transfer of the property, in respect of the sale of a property.

[2] The claim arises from an incident of cybercrime. The plaintiff received email correspondence from an employee of the defendant requesting that the plaintiff deposit and the transfer fees be paid into a bank account. Unbeknown to the plaintiff the email was intercepted by a hacker who inserted their own banking details in an email and the monies were transferred into the hacker's bank account resulting in a loss to the plaintiff. The plaintiff believed he was effecting a transfer into the defendant's bank account. He states he was defrauded by a third party in the particulars of claim. The plaintiff suffered a loss of R889 308.50, being the deposit and transfer fees for the transaction, that was paid into the incorrect bank account which he believed to be the defendant's trust account. He is unable to recover the amount from the incorrect bank account.

[3] The defendant excepts to the particulars of claim, contending that the particulars of claim are clearly excipiable. This is so it says because the plaintiff fails to disclose a cause of action, alternatively, the particulars of claim are vague and embarrassing in a number of respects. The defendant raised five grounds of exception and contended further that the plaintiff failed to plead the material facts that would permit this Court to draw conclusions of liability in the law of delict. In highlighting this, the defendant states that the particulars of claim do not plead the facts which identify any conduct on the part of the defendant which, if proved, would amount to conduct in breach of the alleged legal duty in that the plaintiff failed to plead facts which demonstrate what steps the defendant did or did not take which falls short of the standard of the reasonable person and which, if proved, would amount to negligent conduct. Thus to the extent that the plaintiff failed to plead the material facts to satisfy either of these two elements of a delict, there is no factual basis or legal basis to determine the manner in which the defendant allegedly caused the plaintiff to suffer a loss.

[4] The defendant contended, additionally, that the plaintiff's particulars of claim are vague and embarrassing in that the plaintiff pleads generally that the defendant has a "professional and legal duty" in terms of the Companies Act and Protection of Personal Information Act 4 of 2013(POPIA) but does not plead the sections in either of these statutes upon which he relies. The defendant is unable to identify which section of the legislation the plaintiff relies on to hold the defendant accountable.

[5] The plaintiff does not state the defendant sent the email but that it appears to have come from an email "ostensibly from the defendant's office. On the basis of this email he paid the amount of R889 308.50 into the bank account specified in the email. The plaintiff avers he lost the money because he was a victim of a "phishing" email scam due to the defendant's "business email being fraudulently compromised" (BEC). He states generally that the defendant had a legal duty and obligation in terms of the Companies Act and POPIA 'to take appropriate and reasonable technical and organisational measures to securely maintain the integrity and confidentiality of any personal information it holds.' This is without any specificity.

[6] The plaintiff asserts that the defendant's duty to the plaintiff as a client in terms of the Companies Act and POPIA would have been discharged had it taken the out steps below. They include:

- 6.1 establishing and maintaining a proper information security management system to protect their own information and that of their clients;
- 6.2 putting in place documented policies or processes governing the use of the technology or that define information management and security;
- 6.3 educating and making its staff using the technology aware of their information security responsibilities.

[7] The issue for determination is whether the plaintiff's particulars of claim are vague and embarrassing.

[8] Rule 18(4) which provides that: 'every pleading shall contain a clear and concise statement of the material facts upon which the pleader relied for his claim. Exceptions go to the root of the defence of the claim.¹ In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*², the Court indicated that courts should adopt a common sense approach and consider the pleadings as well as the documents attached thereto, which tell a story.

[9] The Court has held previously³ that:

"Particulars of claim should be so phrased that an defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made."

FIRST GROUND

[10] The defendant complains that the plaintiff's pleading does not enable it to identify what conduct by it is alleged to have been wrongful or negligent. The allegations in paragraphs 16 to 19 of the particulars of claim are general statements describing broad duties and the plaintiff does not identify elements of the defendant's system or practice it alleges to be defective. The subsequent paragraphs 20 and 21 are equally broad allegations that the 'defendant failed to discharge its legal duty when it reasonably could have done so' and was negligent. The plaintiff's particulars of claim do not aver any facts which identify the specific conduct on the part of the defendant which, if proved, would amount to conduct of breach of the alleged duty pleaded in paragraphs 16 to 19. The

¹ *Dharumpal Transport Pty Ltd v Dharumpal* 1956 (1) 700 (A) at 706; *Vermeulen v Goose Valley Investments Pty Ltd* 2001 (3) SA 986 (SCA) at 997; *Koth Property consultants CC v Lepelle-Nkumpi Local Municipality Ltd* 2006 (2) 25 (T) at 31

² *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 2 & 465H

³ *Trope v South African Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208 (T) at 269

defendant is thus unable to ascertain whether the plaintiff relies on a positive act or an omission by the defendant. The defendant maintains that the plaintiff's particulars of claim lack the averments necessary to sustain a cause of action against the defendant.

[11] In response, Counsel for the plaintiff submitted on the first ground relating to the alleged lack of averments, that pleadings must be read as a whole and not in isolation. It was excipiable only if evidence led would not disclose a cause of action. He argued that the pleadings were not vague such that no cause of action was discernible. Additionally, he continued that a distinction had to be made between *facta probanda* and *facta probantia*. Counsel relied on the *Trope*⁴ decision to submit that the plaintiff's particulars of claim would only be vague and embarrassing if the pleadings were contradictory and not pleaded in the alternative. He continued moreover that the defendant's attack on the particulars of claim being void of specificity and particularity was ill-founded.⁵

SECOND GROUND

[12] In further submissions to dismiss the exception, counsel for the defendant argued that the plaintiff's bold claim that the 'defendant negligently caused the incident' was not sufficient in that negligence is a legal conclusion. The plaintiff failed to plead all material facts which supported the conclusion it sought the court to reach. Counsel relied on the decision of *VM and Another v Member of the Executive Council for Education, Eastern Cape Provincial Government and Others*⁶ where the plaintiff failed to aver necessary facts to establish negligence and the court upheld the exception.

[13] In response, Counsel for the plaintiff submitted that the allegations specifically made carried with them implied allegations and were to be read as such. This included the reference to the defendant experiencing a similar

⁴ *Trope* above at para 221 A-E

⁵ *Jowell v Bramwell-Jones & Others* 1998 (1) SA 836 (W); *Nel and Other NNO v McArthur and Others* 2003(4) SA 142 (T)

⁶ 1 [2020] ZAECBHC 32

breach previously. This was indicative of the defendant's failure to implement and maintain a proper information management security system of their own and clients' information.

THIRD AND FOURTH GROUND

[14] The defendant avers that the plaintiff's particulars of claim contain the same defect in that it makes reference to the defendant's duty in terms of the Companies Act and POPIA and does not specify the act or omission with specificity but references sections of the legislation instead. The plaintiff then simply attributes conclusions such as "that the defendant failed to discharge its legal duty when it reasonably could have done so" and "negligently caused the incident". The conclusions are not obvious or tenable argued counsel without the plaintiff attaching facts to support the conclusions. Counsel continued that the particulars suggest a person other than the defendant caused the loss and the plaintiff's particulars of claim do not establish factual or legal causation against the defendant. Counsel for the plaintiff submitted that the defendant was required to comply with POPIA in its entirety and if was not applicable it could deny the allegation. The phishing scam that the plaintiff was subject to was an indication of the compromise of the defendant's information system.

[15] Counsel for the plaintiff noted that the reference to the Companies Act and the defendant being a partnership and acknowledged that the Particulars of Claim required an amendment to remove the reference to the Companies Act. It was in any event an allegation that the defendant could deny and did not require an over technical approach counsel submitted.

FIFTH GROUND

[16] Additionally, counsel submitted where the plaintiff relied on a professional duty owed by the defendant to the plaintiff specifically, the plaintiff failed to establish a relationship of an attorney-client relationship between it and the defendant. The only "client relationship" that is evident is the relationship between the defendant and the seller. The seller nominated and appointed the defendant as the conveyancing attorney in respect of the sale of the property. Thus the defendant contends it is not clear from the plaintiff's particulars of

claim what professional legal duty the plaintiff relies upon. Counsel submitted that it was not clear whether such professional duty was a duty that the defendant owed specifically to the plaintiff. Counsel referred to the case of *Fourie v Van der Spuy and De Jongh Inc. and Others*⁷ where the court dealt with an instance of cybercrime. She submitted that the facts differed from the present matter as the plaintiff was a client of the law firm in that matter. The client claimed damages against the firm where one of the attorneys erroneously transferred the client's funds held in the firm's trust account into several bank accounts held by one or more unknown hackers. In that matter, the attorney was negligent as it failed to exercise the requisite skill, knowledge and diligence that was accepted in the practice of an attorney and the associated standard of care, skill and diligence in the performance of their professional duty. The matter gave rise to a contractual mandate of an attorney/client relationship encompassing fiduciary obligations and a duty of care towards the client; and the common law duty which required sufficient care and attention. In the present matter, the plaintiff did not plead a contractual relationship between it and the defendant or explain how one arose or the extent thereof thus counsel requested that the plaintiff's claim be dismissed with costs.

[17] Counsel for the plaintiff argued that the fact that the defendant as nominated attorneys would transfer the property and be paid for the transfer implied a relationship from the expressed facts and that established a client relationship. If the defendant disputed that a relationship existed, it could deny same. For this reason, the plaintiff requested that the exception be dismissed.

[18] In considering the various grounds raised and counter submission made, it is instructive that a common sense approach inform the view adopted as indicated in *Telematrix*⁸. The defendant failure to implement and maintain a proper information management security system of their own and clients' information if proven may well assist the plaintiff's case even if the reference to the Companies Act is conceded to be incorrect. The plaintiff indicated this

⁷ *Fourie v Van der Spuy and De Jongh Inc. and Others* [2019] ZAGPPHC 449; 2020 (1) SA 560 (GP)

⁸ See fn2 above

requires an amendment which will occur. There is an issue relating to the incident of BEC and the defendant's duty to its client which it says it does not owe to the plaintiff. This approach is conservative. The defendant received money from the plaintiff to hold into their Trust account. It would be taking a short sighted view to suggest that such party could never expect any courtesy and protection of their money, and information whilst engaging with an attorney. It is also contrary to the purposes of POPIA that the plaintiff's information and privacy were breached through the defendant's IT portal.

[19] As far as cost are concerned the usual order should follow.

[20] For the reasons above I make the following order:

1. The application for exception is dismissed with costs.



S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the plaintiff	: Adv. Awie du Plooy
Instructed by	: Kyprianou Attorneys
On behalf of the defendant	: Adv. Ammara Cachalia
Instructed by	: Webber Wentzel
Date of hearing	: 20 February 2023
Date of judgment	: 06 March 2023