

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, GQEBERHA**

**Case No.: 3104/2021**

**Date Heard: 11 May 2023**

**Date Delivered: 6 June 2023**

In the matter between:

SOLATHA GENERAL TRADE CC

Plaintiff

and

INTERTOWN TRANSPORT (PTY) LTD

Defendant

**JUDGMENT: EXCEPTION**

RONAASEN AJ:

**Introduction**

[1] On 19 October 2021 the plaintiff instituted an action against the defendant in which it sought payment of damages from the defendant in the sum of R1 063 247.00, and ancillary relief.

[2] The plaintiff alleges that, on 30 March 2021, it purchased a brand-new combined incubator/hatcher machine ("the machine") from a supplier in Johannesburg. Thereafter, on 1 April 2021, at Gqeberha, it concluded an oral agreement with the defendant in terms of which the defendant was required to transport the machine from Johannesburg to the plaintiff's business premises in Gqeberha.

[3] The plaintiff avers that it paid the agreed price for the transport services to the defendant. It states further that upon agreeing to transport the machine the defendant came under a legal duty to:

3.1. act with a degree of care, skill and diligence as would ordinarily be expected of a courier company, in similar circumstances;

3.2. carry out the duties and obligations it had assumed in terms of the agreement with reasonable skill and care;

3.3. ensure that the delivery of the machine would occur safely and without any damage being caused to the machine; and

3.4. deliver the machine timeously to the plaintiff.

[4] The plaintiff then goes on to allege that the defendant breached the terms of the agreement, alternatively the duty of care which it to the plaintiff by failing to:

4.1. deliver the machine timeously to the plaintiff and then advising the plaintiff the machine had been damaged in transit;

4.2. act with the degree of care, skill and diligence expected of a courier company, in similar circumstances;

4.3. carry out all its obligations with reasonable skill and care;

4.4. ensure that the delivery of the machine occurred safely and without any damage to the machine; and

4.5. provide the agreed delivery/courier service with professional skill, care and diligence as could reasonably be expected of a courier company, while they could and should have done so.

### **The defendant's exception**

[5] On 25 October 2022 the defendant delivered a notice in terms of Uniform Rule 23(1) in which it informed the plaintiff that it contended that the particulars of claim were excipiable in various respects and that in the absence of a response to the notice it would deliver an exception.

[6] The notice was not responded to by the plaintiff and an exception was duly delivered by the defendant on 25 November 2022, echoing the notice in terms of rule 23(1).

[7] In summary the exception proceeds on the following grounds:

7.1. to the extent that the plaintiff seeks to hold the defendant liable for the negligent conduct of its employees, the plaintiff had failed to allege that the employees were acting in the scope and course of their employment with the defendant; and

7.2. the legal duty of care relied upon by the plaintiff emanated from the alleged oral agreement, according to the particulars of claim. Thus, the plaintiff had impermissibly conflated a claim based on an alleged breach of contract and a claim founded on an alleged delict. Policy considerations did not permit that delictual liability could be imposed for the negligent breach of a contract; and

7.3. accordingly, the plaintiff's claim was bad in law as it lacked the averments necessary to sustain a cause of action, alternatively, it was vague and embarrassing.

### **Legal principles**

[8] On a consideration of the averments relied on by the plaintiff it is apparent that the plaintiff is contending that the defendant is a carrier in the position of a depositary or bailee, for reward. Therefore, it is apposite to refer to the following passage from the judgment of the former Appellate Division in *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (AD) at 761H-762C, to the following effect:

“Assuming, however, that the Edict does not apply to public carriers by land, it seems to me that the carrier would still be in the position of a depositary or bailee for reward, who is under a duty to exercise reasonable care in regard to the goods entrusted to him for conveyance and who, in the event of the goods being damaged or destroyed, is liable in damages to the owner thereof unless he can show that the damage or destruction occurred without *culpa* or *dolus* on his part. The position of a contracting party whose liability is governed by the provisions of the Praetor’s Edict and the position of a depositary or bailee for reward is similar in that in each case the *onus* which lies on him in regard to loss of or damage to the goods entrusted to his custody ‘arises as an inference from the nature of the contract which places him under an obligation to return the article or prove the reason why he has failed to do so’.” [references omitted]

### **Application of legal principles**

[9] In my view the averments in the particulars of claim disclose a cause of action to hold the defendant liable in damages to the plaintiff on the basis that it was a carrier (in respect of the machine) and thus a depositary or bailee for reward. My conclusion in this regard thus puts paid to the grounds of exception summarised in paragraph 7.2, above.

[10] Also, my conclusion disposes of the ground of exception in terms of which the defendant alleges that the particulars of claim are excipiable as the plaintiff had failed to allege that the employees of the defendant, whose negligence it is alleged caused the damage to the machine, were acting in the scope and course of their employment with the defendant.

[11] Paragraph 12 of the particulars of claim commences with the following preamble:

“In breach of the agreement set out above, alternatively in breach of the defendant’s duty of care as set out above, the defendant’s employees acting as aforesaid were negligent in that they:”

The plaintiff then goes on to set out various grounds of negligence. It is particularly the preamble which the defendant contends is deficient.

[12] Given the nature of the contract on which the plaintiff relies, i.e., a contract of carriage, which, by operation of law, has the characteristics described in the *Stocks* judgment, the averments in paragraph 12 of the particulars of claim are superfluous.

[13] In respect of contracts of carriage, when suing the carrier for damage to the goods which were the subject matter of the contract, a plaintiff need only aver the following:

13.1. the conclusion of the contract;

13.2. the fact that it was an implied term of the contract that the goods would be delivered at their destination in a sound and undamaged condition;

13.3. the breach of the contract in that the goods did not arrive in a sound and undamaged condition; and

13.4. particularity of the damages suffered as result of the breach.

See *Amler’s Precedents of Pleadings* by LTC Harms (ninth edition) at 68-7.

[14] If those essential averments are made and, in this case, they are then the defendant bears the *onus* to establish that any loss or damage the plaintiff may have sustained occurred without its fault.

[15] The plaintiff was therefore not required to allege that the defendant's employees acted in the scope and course of their employment with the defendant.

**Conclusion and order**

[16] The exception accordingly has no foundation. As a result, I make the following order:

*The exception is dismissed with costs.*

**O H RONAASEN  
ACTING JUDGE OF THE HIGH COURT**

Appearances:

Counsel for Plaintiff: Adv V Madokwe

Instructed by: Ntanzi Attorneys Inc.

Counsel for Excipient/Defendant: Adv L Voultosos

Instructed by: Goldberg & De Villiers Inc