

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No: 24289/2022

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

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SIGNATURE DATE: 20 September 2023

In the matter between:

JAYDEE FILLING STATION CC
t/a CALTEX KOMAT

Plaintiff

and

ROYALE ENERGY (PTY) LTD
t/a MPUMALANGA SOUTH BRANDED MARKETER

Defendant

JUDGEMENT

- 1 The defendant excepts to the particulars of claim on the basis that the particulars do not disclose a cause of action. There is one main exception and three alternative exceptions. The court is also to consider an application to amend the particulars of claim.
- 2 The plaintiff and defendant concluded a written operating lease on 14 December 2015 in respect of a service station. The plaintiff would purchase "petroleum products" from the defendant on the terms set-out in the agreement; including that petroleum products would be sold at a ruling market price set by the Department of Minerals and Energy Affairs.
- 3 The plaintiff, acting pursuant to section 12B of the Petroleum Products Act 120 of 1977, complained to the Controller of Petroleum Products ("the Controller") about certain alleged unfair and unreasonable contractual practices by the defendant. The complaint was made on 23 August 2018. The Controller referred the complaint to arbitration, with Mr. Michael Kuper SC as the arbitrator.
- 4 The issue identified by the parties for determination by the arbitrator was whether the defendant had correctly charged the plaintiff for petroleum products at the ruling market prices as set out by the Department of Minerals and Energy Affairs.
- 5 The arbitrator determined, in part, that "[w]ithout limiting the scope or extent thereof, Royale is guilty of using unfair and unreasonable

contractual practices in unilaterally and in breach of the OLA, varying the price of petroleum products that Jaydee purchases from Royale and being unjustifiable in breach as a result thereof.”

6 The arbitrator granted relief as follows:

“83 The following declaration and order is made:

83.1 The terms of the Operating Lease - Lease of Service Station concluded between the parties and dated 16 November 2015 requires Royale to sell to Jaydee petroleum products at the wholesale margin set by the Minister of Energy Affairs from time to time;

83.2 Royale is not entitled to add to the wholesale price so determined any amount in respect of CAPEX RAS, or any other amount;

83.3 As from 1 August 2021 and for the duration of the lease Royale shall limit its price accordingly.”

7 The plaintiff instituted action proceedings against the defendant following the award. The plaintiff pleads that the defendant sold petrol to the plaintiff other than as agreed in the lease agreement. The plaintiff makes four claims.

8 The first claim is for a declaratory order that the defendant may not add transport or any other costs to the price of the petrol products as calculated in accordance with paragraphs 83.1 and 83.2 of the award on petrol products sold to the plaintiff by the defendant.

9 The second claim is an enrichment claim based on the *condictio indebiti*. This pertains to sales of all petrol products by the defendant to the plaintiff

over the period 1 December, 2015 to 30 March 2022. The plaintiff says it was overcharged the amount of R5 942 790.70 and that the plaintiff made payment under threat and under protest.

- 10 The third claim is also an enrichment claim, on the same grounds as the second claim. The plaintiff pleads that the defendant overcharged the plaintiff in the amount of R356 834.78 during the period after the arbitrator's award, namely from 3 August, 2021 to 30 March, 2022.
- 11 The fourth claim is that the arbitrator's award be made an order of court in terms of section 31 (1) of the Arbitration Act, 42 of 1965.
- 12 The first exception is raised against all four claims. The defendant contends that the arbitrator had no power to interpret the lease agreement or to make an order pursuant to that interpretation.
- 13 The defendant raises three alternative exceptions. The first alternative exception is against claims 1 and 3, the second and third alternative exceptions are against claim 2.
- 14 The first exception is premised on the particulars of claim not disclosing a cause of action. The meaning of "cause of action" was distilled in the matter of *Knoesen and Another v Huijink-Maritz and Others*¹, as follows:

"Cause of action: "was defined[25] by Lord ESHER, MR in *Read v Brown* 22 QBD 131 to be "every fact which it would be necessary for the plaintiff to prove if

¹ (5001/2018) [2019] ZAFSHC 92 (31 May 2019), para 41

traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved". See also *Cooke v Gill*, LR 8 CP 116, S 64(1) of Act 22 of 1916: means "every fact which is material to be proved to entitle a plaintiff to succeed in his claim" (*Lyon v SAR&H* 1930 CPD 276); but it can mean "that particular act on the part of the defendant which gives the plaintiff his cause of complaint". "A cause of action accrues, when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed" (per GARDINER, JP, adopting s 64 of Halsbury, xix, in *Coetzee v SAR&H* 1933 CPD 570). See *G North & Son v Brewer & Son* 1941 NPD 74; *Beaven v Carelse* 1939 CPD 323; *Abrahamse & Sons v SAR&H* 1933 CPD 626; *McKenzie v Farmers' Co-op Meat Industries Ltd* 1922 AD 16; *Huletts v SAR&H* 1945 NPD 413."

- 15 The above description of the content of "cause of action" is to be considered together with the approach that "[a] charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation."²

The main exception

- 16 I do not accept that no cause of action is shown upon every reasonable interpretation which the particulars of claim can reasonably bear.³

² *Southernport Developments (Pty) Ltd (previously known as Tsogo Sun Ebhayi (Pty) Ltd) v Transnet* 2003 (5) SA 665 (W)

³ *Lewis v Oneanate (Pty) Ltd & another* 1992 (4) SA 811 (A) at 817F-G.

- 17 The exception is essentially an attack on the award. It is submitted on behalf of the excipient that the underlying question in the arbitration engaged the determination of the sale price of petroleum products in terms of an operating lease, an issue that fell within the exclusive common law jurisdiction of a court. The excipient also contends that the plaintiff sought *ultra vires* common law relief for historical compensation and common law specific performance of the contract; pertaining only to petrol.
- 18 The competency or otherwise of the award is not a matter that can be determined in exception proceedings. This is particularly because a court in exception proceedings is to accept averments in the particulars of claim as statements of fact.
- 19 The defendant contends that the “dispute” between the parties, on any interpretation, is a question of the validity of the operating lease agreement or the interpretation of the mechanism for determining the price of petrol or of petroleum products.
- 20 The jurisdiction of the arbitrator in a section 12 B arbitration was described as follows in *Bright Idea Projects 66 (Pty)Ltd v Former Way Trade and Invest (Pty) Ltd*:⁴

Demarcating the jurisdiction and powers of S12B arbitration will depend, case by case, on how parties, in particular a referring party, frame the terms of reference.

The voluntary, self-regulatory aspects of arbitration allow

⁴2018 (6) SA 86 (KZP) (10 July 2018) , para 29

the parties to include or exclude any matter in the terms of reference for the arbitrator's determination. If the parties cannot agree, then the jurisdiction and powers of the arbitrator will be governed by S12B(4) of the PPA.

- 21 The parties framed the terms of reference for the determination by the arbitrator. They limited the reference to sales of petrol.
- 22 I disagree that the arbitrator exceeded his powers in considering the terms of the agreement between the parties. It is inherent in what was asked of the arbitrator that the arbitrator would have to examine the agreement between the parties.
- 23 The exception does not meet the required standard. The exception also relates to interpreting the lease agreement between the parties. Courts are required to be circumspect when deciding issues with reference to questions concerning the interpretation of contracts on exception. The defendant bears the onus of persuading the Court that no cause of action has been revealed on every interpretation.⁵
- 24 The defendant has not shown that there is no cause of action on every reasonable interpretation of the underlying contract that informs the claim by the plaintiff.
- 25 I now address the alternative grounds raised by the defendant.

The first alternative exception

⁵ Francis v Sharp 2004 (3) SA 230 (C) at 237D-I

26 The defendant excepts on the basis that the plaintiff pleads a claim on a dispute that arose after completion of the arbitration, whereas section 31(2) of the Arbitration Act 42 of 1965 limits the jurisdiction of a court to correct a clerical mistake or a patent error arising from any accidental slip or omission in an award; and that a court may not add to the award a finding in relation to a dispute that arose after completion of arbitration proceedings.

27 The objection is unsound. The particulars of claim do not call for changes to the award.

The second alternative exception

28 Claim 2 is a claim for payment of the overcharges for the period 1 December 2015 to 28 July 2021, being the period before the date of the arbitrator's award. The defendant objects on the ground that the claim is *res judicata*.

29 The arbitrator did not consider a claim for amounts for the period 1 December 2015 to 28 July 2021. *Res judicata* is a defence that must be raised by way of a special plea. It cannot be raised as an exception to a claim because evidence must be led as to the previous litigation.⁶ This exception cannot stand.

The third alternative exception

⁶ Lowry v Steedman 1914 A.O. 532 at 539.

- 30 The defendant contends that the plaintiff failed to plead a proper cause of action based on enrichment, by failing to plead payment under protest. The defendant says the plaintiff both pleads that payments were made as reasonable/excusable errors and as payments which the plaintiff knew were not due, without pleading that payment was made under protest.
- 31 The plaintiff pleads that it complained to the defendant. It also pleads that it made payments under protest. An overall consideration of the particulars also show that the plaintiff paid under protest.
- 32 An exception that particulars do not disclose a cause of action, as is the case in this exception, requires a showing that no cause of action is disclosed upon every interpretation which the particulars of claim can reasonably bear. The defendant has not met the test. The particulars reveal triable issues.

Intended amendment to the particulars of claim

- 33 I now consider the application to amend. The defendant does not object to all the intended amendments.
- 34 The proposed amendments introduce further content of the agreement between the parties into the pleadings. Paragraphs 1 to 3 of the intended amendment references the content of the agreement between the parties. Paragraph 4 is an elaboration on how the defendant obliged the plaintiff to pay. This is illustrated by paragraph 10.9, which states that "In the premises the Plaintiff is and was obliged to pay for the consignments of the petrol products and must then seek recourse for any incorrect invoicing

after payment of the consignments of the petrol products delivered to the Plaintiff by the Defendant.”

35 The objection to the intended amendment is unmeritorious in the whole. The defendant can plead to the issues.

36 I make the following order:

36.1 The exception is dismissed, with costs.

36.2 The amendment is granted, with costs.

Omphemetse Mooki

Judge of the High Court (Acting)

Heard on: 8 August 2023

Delivered on: 20 September 2023

For the Plaintiff: A Louw SC

Instructed by: Friedland Hart Solomon & Nicholson

For the defendant: S Aucampt

Instructed by: Van der Walt Attorneys